IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.1327 OF 2006
IN
APPEAL NO.334 OF 2005
IN
NOTICE OF MOTION NO.3185 OF 2004
IN
SUIT NO.3121 OF 2004

Gopal L. Raheja
& Anr. ..Appellants/
Orig. Plaintiffs.

Vs.

Vijay B. Raheja
& Ors. ..Respondents/
Orig. Defendants.

Mr.Aspi Chinoy, Senior Advocate with Mr.Janak Dwarkadas, Senior Advocate with Mr.P.K.Samdhani, Senior Advocate with Mr.P.K.Shroff with Mr.Subodh Joshi with Ms.Radhika Pinzara with Ms.Prachi Khandge i/b.M/s.Parimal K. Shroff & Co. for the Appellants.

Mr.N.H. Seervai, Senior Advocate i/b. M/s.J.Sagar Associates, for Respondent Nos. 1 to 4.

Mr.I.M.Chagla, Senior Advocate with Mr.Levy Pareira with Mr.S.V.Doijode & Ms.Minakshi Iyer i/b.M/s.Doijode Associates for Respondent Nos.5 to 7.

Mr.D.J.Khambata, Senior Advocate i/b.M/s.Raval Shah & Co. for Respondent No.8.

Mr.M.S.Doctor i/b.M/s.S.R.Rawell & Co. for Respondent No.9.

CORAM : DR.S.RADHAKRISHNAN AND
S.J.VAZIFDAR, JJ.

DATE OF RESERVING
THE JUDGMENT : 7TH AUGUST, 2006.
DATE OF PRONOUNCING
THE JUDGMENT : 15TH NOVEMBER, 2006.

ORAL JUDGMENT : (Per S.J. Vazifdar, J.)

The Appellants are the original Plaintiffs and the Respondents are the original Defendants in the same order. The Appellants have taken out this Notice of Motion in the above Appeal for an order striking out the defences of the Respondents under Order XXXIX, Rule 11 of the Code of Civil Procedure 1908, attaching the property of the Respondents and for the detention of Respondent Nos.1 to 3 and 6 and 7 in civil prison under Order XXXIX, Rule 2A of the Code of Civil Procedure, 1908. The Appellants have also sought an order setting aside and/or declaring as null and void the resolutions passed by Respondent Nos.5 to 9 dated 27.3.2006 and 31.3.2006 increasing the authorised share capital of Respondent No.5 on the ground that the same were in wilful breach of the injunction/restraint orders of this Court dated 22.3.2005 and 25.10.2005.

2. In a nut shell, the Appellants case is that by virtue of the orders dated 22.3.2005 and 25.10.2005 the Respondents were restrained inter-alia from exercising any rights or receiving any benefits in respect of the shares held by them in Respondent

No.5. Contrary to the orders, by the said resolutions dated 27.3.2006 and 31.3.2006 the authorised capital of Respondent No.5 was increased from Rs.40 crores to Rs.210 crores and the new shares were allotted to Respondent Nos.1 to 3, 8 and 9. Admittedly, the impugned resolutions were passed by the shareholders exercising their rights in respect of the shares covered by the injunction. The resolutions required the exercise of voting rights as while under section 94(1) of the Companies Act, a company may increase its share capital by issuing new shares, under section 94(2) such powers are to be exercised by the company in general meeting.

3. The resolutions were clearly in violation of the said orders which restrained the shareholders of Respondent no.5 from exercising any rights in respect of their shares. As we shall demonstrate, the Respondents in their affidavits did not deny that the plain language of the order prohibited such an act. Mr.I.M. Chagla, for Respondent Nos.5, 6 and 7 and Mr.D.J. Khambata and Mr.M.S. Doctor for Respondent Nos.8 and 9 respectively, fairly agreed that this was so.

4. Had the Respondents apologised and offered to purge the contempt, we may have let the matter rest there. Having accepted that the resolutions were passed in breach of the said orders all they had to do to establish their bona-fides was to agree to the resolutions being revoked, and the issue of the shares pursuant thereto being cancelled. They could then have made an appropriate application for achieving their alleged purpose of raising funds for Defendant No.5.

5. They however refused to do so. The refusal to purge the contempt and the extensive defences taken and justification pleaded by the Respondents, especially Respondent Nos.1, 2 and 3, of their conduct, has complicated an otherwise simple issue, burdened this judgment and aggregated the contempt. As we shall demonstrate, the nature of defences raised especially by Respondent Nos.1 to 4 has further aggravated the contempt.

6. The Respondents supported each other generally. Their approach before us, during the hearing, differed in the degree of defiance. While Mr.Seervai on behalf of Respondent Nos.1, 2 and 3 contended that there was no contempt at all and

stated that Respondent Nos.1 to 4intended "taking the Notice of Motion head-on", the other Respondents did not go that far though, they too sought to justify their conduct with considerable vehemence.

The parties :

7. The Plaintiffs and Respondent Nos.1 to 3 are in control and/or management of and/or concerned with various hotels together with each other and/or individually. Plaintiff No.1 is the father of Plaintiff No.2. Respondent Nos.1 and 2 are the sons of the paternal uncle of Plaintiff No.1. Respondent No.3 is the son of Respondent No.2. Respondent No.4 Mont Blanc Hotels Pvt. Ltd., is a company registered under the Companies Act, 1956 in which Respondent Nos.1 and 3 are directors and Respondent Nos.1 and 2 and/or their family members hold the entire or the majority shares. Gstaad Hotels Pvt. Ltd., is Respondent No.5 and Respondent Nos.6 and 7 are the directors of Respondent No.5. Respondent Nos.8 and 9 are shareholders alongwith Respondent Nos.6 and 7 in Respondent No.5.

Reliefs claimed in the suit :

8. The Appellants filed the suit for a declaration that Respondent Nos.1, 2 and/or 6 to 9 hold 50% of the shares and 50% of the directorship of Respondent No.5 through which Respondent Nos.1 and 2 acquired the suit property in March, 2004 in trust for and for the account and benefit of the Plaintiffs and/or their nominee and for a decree ordering the Respondents to transfer 50% of the issued share capital of Respondent No.5 to the Plaintiffs and to appoint the Plaintiffs and/or their nominees as 50% of the directors on the board of Respondent No.5 against payment of 50% of the total cost of the property. The Appellants also sought a permanent injunction restraining the Respondents from dealing with, developing, alienating or encumbering the suit property, and constructing thereon unless the Respondents first transferred to the Plaintiffs 50% of the shares of Respondent No.5 and appointed the Plaintiffs and/or their nominees as 50% of their directors on the board of Respondent No.5.

Disputes between the parties on merits :

9. For the purpose of this Notice of Motion, it is necessary to set out the facts pertaining to the main dispute only briefly and only with a view to

furnish the necessary background before dealing with the interim orders passed by this Court and which, according to the Appellants, have been violated by the Respondents. The merits thereof are not relevant for the decision on this Notice of Motion.

10(a). The Plaintiffs were interested in starting a hotel in Bangalore and were negotiating with United Breweries (Holdings) Ltd. (hereinafter referred to as UB) for acquisition from them of a three acre plot situated in a prime locality in Bangalore. Respondent Nos.1 and 2 agreed with the Plaintiffs that they would, with a nominee company, bid for and acquire from UB the said plot of land and would give the Plaintiffs equal shares and directorships in the acquiring company and that a five star hotel would be constructed and operated on the property by the Plaintiffs on the one hand and Respondent Nos.1 to 3 on the other as partners, with participation by M/s.Marriott International. This agreement, according to the Appellants, is embodied in and evidenced by various documents and, in particular, a writing dated 27.9.2003 which reads as under :

"Sub: UB City Property of 3 acres bearing Khatta No.24 situate at the corner of Kasturba Gandhi

> Marg and Vithal Mallya Road, Bangalore.
>
> We confirm that we are buying the above property in a company called Mont Blanc Hotels Pvt. Ltd. (Respondent No.4) and to make you a partner, we are giving you equal shares on the same terms and conditions & equal directorship in Mont Blanc Hotels Pvt. Ltd. as our group holds. Both our groups confirm that Marriott shall have equity stake in the company. We shall carry out the amendments to the Memorandum of Article, in 30 days and shall then give the equity to you."

The document is signed by the Appellants and Respondent Nos.1 and 2.

(b). According to the Appellants, the entire documentation in respect of the transaction was to be undertaken by Respondent Nos.1 and 2 in the name of Respondent No.4 and that the Appellants would remain in the background, pending finalisation of the acquisition of the property to minimise the risk of other parties giving higher offers for the said property if it became known in the market that reputed hoteliers such as the parties herein, were interested in the said property and to avoid any sabotage of the said transaction by one Chandru L. Raheja, the brother of Plaintiff No.1, between whom relations were strained. Upon acquisition of the

property from UB, the hotel project would be owned and developed by Respondent No.4 in equal partnership as aforesaid.

The transaction between the Appellants and Respondent Nos.1 to 3 was to be given effect to by allotment of shares, appointment of Directors, modification of the articles of Respondent No.4 and payment within 30 days.

(c). In view of the aforesaid agreement, the Appellants did not make a separate bid for the purchase of the property.

(d). An agreement for sale was entered into between UB and Respondent No.4 by which Respondent No.4 agreed to purchase the properties at the price of Rs.40.50 Crores of which Rs.11.50 Crores was to be paid as an advance. UB executed a power of attorney in favour of Respondent No.4 to enable it to apply for and obtain permissions necessary for the hotel project. The Appellants paid Respondent No.2 a sum of Rs.1 Crore in cash towards 50% of their consideration of the Rs.2 Crores paid in cash by Respondent Nos.1 and 2 to UB in relation to the advance consideration of Rs.11.50 Crores.

(e). The implementation of the aforesaid understanding was delayed allegedly due to Respondent Nos.1 and 2 not finalising the same. Ultimately, it was agreed that the same would be given effect to in early March, 2004. Respondent Nos.1 and 2 thereafter failed to proceed as agreed and to fulfil their part of the obligations and by their letters dated 12.4.2004 and 20.5.2004 contended that the agreement dated 29.9.2003 between Respondent No.4 and UB had been cancelled and neither Respondent No.1 nor Respondent No.2 were any longer involved in the property.

(f). The Appellants contended that, in fact, on 26.3.2004 Respondent Nos.1 and 2 acting through Respondent No.5, completed the purchase of the property from UB and that contrary to their contention that they were no longer involved with the property they were and, they had in fact been fully involved in applying for and obtaining necessary permissions for construction of the hotel through Respondent No.5. Apparently, several draft agreements were exchanged between the Appellants and Respondent Nos.1 to 3. In support of their contention that Respondent No.5 was, in fact,

controlled by Respondent Nos.1 to 3, the Appellants have relied upon various documents addressed to various authorities by Respondent Nos.1 to 3 purportedly on behalf of Respondent No.5. The Appellants have also relied upon the transcript of tape-recording of certain meetings. It is not necessary to deal with the extensive evidence relied upon by the Appellants in support of this contention. The same would be relevant to the merits of the case and not for the purpose of the present Notice of Motion.

11(a). Respondent Nos.1 to 3 denied the aforesaid contentions. According to them, one of the reasons for terminating the agreement between Respondent No.4 and UB was that the Appellants had not fulfilled their financial obligations in respect of the acquisition of the said property. According to the Respondents, on 19.1.2004 the agreement between Respondent No.4 and UB stood cancelled and on the same day an agreement was entered into between UB and Respondent No.5 at the same price and on the same terms and conditions as the original agreement between Respondent No.4 and UB and for the same purpose viz. constructing and operating a deluxe hotel on the property. The property had thereafter

been purportedly acquired by Respondent No.5. Thereafter Respondent Nos.1 to 3 ceased to have any interest in or connection with the said property and the transaction between Respondent No.4 and UB stood finally terminated. They contend that they have nothing to do with the remaining Respondents.

(b). By a letter dated 12.4.2004 Respondent No.1 stated that it had become impossible to meet the time schedule set by UB and Marriott Hotels in the absence of funds from the Plaintiffs and that as a result thereof Respondent No.1 had withdrawn from the project. Respondent No.1 further stated that the agreement between Respondent No.4 and UB had been terminated by mutual consent.

12. To sum up, the Appellant’s case is that Respondent Nos.1 and 2 have purported to complete the purchase of the property through Respondent No.5 and have taken the conveyance of the property from UB through Respondent No.5 on 26.3.2004; that although Respondent Nos.1 and 2 are ostensibly neither shareholders nor directors of Respondent No.5, and, although the ostensible shareholders and directors of Respondent No.5 are Respondent Nos.6 to 9, the sequence of events and the documents on

record establish that Respondent Nos.1 and 2 are acting through Respondent No.5 which is the nominee of and controlled by Respondent Nos.1 and 2. The above stratagem, according to the Appellants, was a device with a view to depriving the Plaintiffs of the benefit of the said agreement viz. 50% share in the property. Respondent Nos.6 to 9 are only nominees, acting at the instance of Respondent Nos.1 and 2 and that the entire design was in breach of the fiduciary capacity and duty of Respondent Nos.1 and 2. The Appellants accordingly contend that the Respondents hold 50% of the shares of Respondent No.5 in trust and for the benefit and on account of the Appellants and/or their nominees and are bound in law to transfer 50% of the share of Respondent No.5 to them and appoint their nominees as 50% of the directors of Respondent No.5.

Status-quo as on the date of the orders dated *22.3.2005 and 25.10.2005 of which the Respondents are alleged to have committed a breach :*

13. Before referring to the orders, it is necessary to set out the status-quo between the parties on the date of the orders. These facts are admitted by and, in fact, constitute the Respondent’s case.

14. The authorised and subscribed capital of Respondent No.5 prior to the impugned resolutions was Rs.40 crores divided into 4 crore equity shares of Rs.10/- each. The issued, subscribed and paid up capital of Respondent No.5 was Rs.19,01,00,000 divided into 1,90,10,000 equity shares. Respondent Nos.6 and 7 held 5000 equity shares each. Respondent Nos.8 and 9 held 1,65,00,000 and 25,00,000 equity shares each respectively.

The proceedings leading to the orders dated 22.3.2005 and 25.10.2005 :

15. The suit was filed on 25.10.2004.

16(a). The Appellants took out Notice of Motion No.3185 of 2004 for various interim reliefs. A learned Single Judge passed ad-interim orders dated 15.12.2004 and 23.12.2004.

(b). The Respondents preferred Appeals against the said order. Respondent Nos.1 and 2 filed Appeal No.10 of 2005, Respondents Nos.5, 6 and 7 filed Appeal (L) No.24 of 2005. Respondent No.8 filed Appeal No.45 of 2005 and Respondent No.9 filed

Appeal (L) No.40 of 2005.

(c). By an order dated 17.1.2005 the Division Bench, to which one of us (S.J. Vazifdar, J.) was a party, admitted and disposed of the Appeals by a common order passed with the consent of all the parties. The learned Single Judge was requested to hear the Notice of Motion expeditiously.

17(a). The learned Single Judge finally disposed of the Appellant's said Notice of Motion No.3185 of 2004 by an order dated 14.3.2005.

(b). The above Appeal before us is from that order. It was admitted on 22.3.2005. The Division Bench, to which one of us (S.J.Vazifdar, J.) was a party, passed an ad-interim order dated 22.3.2005, in terms of the said order dated 17.1.2005.

(c). The Appellants took out Notice of Motion No.853 of 2005 in the above Appeal for interim orders. This Notice of Motion was finally disposed of by the Appeal Court by an order dated 25.10.2005 passed by the Division Bench, to which one of us (Dr.S. Radhakrishnan, J.) was a party. The order dated 25.10.2005 expressly continued, pending the

hearing and final disposal of the Appeal, the ad-interim order dated 22.3.2005.

18. In other words, by virtue of the order dated 25.10.2005 and with effect from that date there existed in operation an order in terms of the order dated 17.1.2005. The only difference is that, whereas, the order dated 17.1.2005 was passed with the consent of the parties, the order dated 25.10.2005 was an order of this Court and not by consent of the parties.

19. The order dated 17.1.2005 reads as under :

> "1. All appeals are admitted and disposal of by consent.
>
> 2. By consent the order of the learned single Judge is substituted with the following order :-
>
> i) There shall be an ad-interim order in terms of prayer clauses (b)(ii) and (iii), except bracketed, portion in clause (b), which read as follows :-
>
> > "(b)(ii) : The Defendants, their servants and agents be restrained by an order and injunction of this Hon'ble Court from encumbering, alienating or parting with possession of the said property more particularly described in Exh. "A" to plaint and the construction

thereon and/or the rights or interest therein.

(iii) The Defendants, their servants and agents be restrained by an order and injunction of this Hon'ble Court from alienating or encumbering the shares of Defendant No.5 Company or from exercising any rights or receiving any benefits in respect thereof." (emphasis supplied)

ii) The Plaintiffs will deposit in this court Rs.12.00 Crores within four weeks from today. If the amount is not deposited within the said period, Motion to stand dismissed.

iii) Any further development on the suit property shall be subject to the result of Notice of Motion and the counsel of the Appellants agree not to claim any equity on account of the said development.

20. The effect therefore of the aforesaid orders is that the parties were bound and liable by the last operative order dated 25.10.2005.

. Mr.Chinoy submitted that they were also bound by the orders and directions of the learned Single Judge which is the subject matter of the Appeal as the same was neither challenged by the Respondents nor stayed by the Appeal Court. Considering the view that we have taken it is not necessary to decide this point.

Resolutions dated 27.3.2006 and 31.3.2006 alleged to be in contempt of the order dated 25.10.2005 :

21. The Appeal reached final hearing before us on 7.3.2006 but was adjourned. The alleged act of contempt took place thereafter i.e. after 7.3.2005 when an adjournment was sought and granted. Before the Appeal reached hearing on the adjourned date, Respondent No.5 filed an affidavit dated 5.4.2006 disclosing the two resolutions which the Appellants contend, are in contempt of the orders of this Court. It sets out extensively the reasons why the Respondents were allegedly constrained to do so. We will come to that aspect when we deal with the justification pleaded by all counsel appearing on behalf of the Respondents. At this juncture, it is necessary to examine the resolutions themselves.

22(a). An Extra Ordinary General Meeting of the shareholders of Respondent No.5 was held on 27.3.2006. Respondent Nos.6 and 7 attended the meeting as directors and members. Respondent No.6 was the chairman of the meeting. It was resolved to increase the authorised share capital of the company from Rs.40 Crores, divided into 4 Crores Equity

Shares of Rs.10/- each, to Rs.110 Crores, divided into 11 Crores Equity Shares of Rs.10/- each ranking pari passu with the existing shares and consequential resolutions amending the Articles of Association, altering the authorised capital and authorising Respondent No.6 to file the necessary documents in the matter.

(b). The resolution was proposed by Respondent No.6, seconded by Respondent No.7 and adopted unanimously.

23. It is important to note that the resolution opens by stating that the same is pursuant to section 94 of the Companies Act, 1956. There is no dispute about the fact that under section 94 of the Companies Act the resolution can only be passed by the company/its members. This is done by the members exercising their rights in respect of the shares held by them. Section 94 in so far as it is relevant, reads as under :

> "**94. Power of limited company to alter its share capital.-**(1) A limited company having a share capital, may, if so authorised by its articles, alter the conditions of its memorandum as follows, that is to say, it may-

> (a) increase its share capital by such amount as it thinks expedient by issuing new shares;
>
> (2) The powers conferred by this section shall be exercised by the company in general meeting and shall not require to be confirmed by the Court.

24(a). On 31.3.2005 another Extra Ordinary General Meeting of Respondent No.5 was held, which was attended by Respondent Nos.1, 2, 6 and one Ms.Avni Raheja, the daughter of Respondent No.1. This meeting was also chaired by Respondent No.6. Respondent No.6 proposed a resolution this time to increase the authorised share capital of the company from Rs.110 Crores to Rs.210 Crores, divided into 21 Crore equity shares of Rs.10/- each. Consequential resolutions regarding the amendment to the Memorandum of Association and authorising Respondent No.6 to file necessary documents in the matter were also passed.

(b). The resolution was proposed by Respondent No.6 and seconded by Respondent No.1 and was adopted unanimously.

Allotment of shares pursuant to the Resolutions and

the consequent alteration in the status-quo as existing on the date of the order :

25A. Pursuant to the resolutions the fresh issue was allotted as follows :

. An aggregate of 7,45,00,000 shares were allotted to three companies owned, managed and controlled by Respondent Nos.1, 2 and/or 3. 35,00,000 and 30,00,000 shares were allotted to two companies owned, managed and controlled by Respondent Nos.8 and 9 respectively.

25B. Thus the status quo which existed on the date of the order i.e. 25.10.2005 was drastically altered by the resolutions and the allotment of shares pursuant thereto in two significant respects. Firstly, the authorised capital of Respondent No.5 was increased from Rs.40 Crores to Rs.210 Crores. Secondly, Respondent Nos.1 to 4/their group companies became shareholders to the extent of about 74% of the paid up capital of Respondent No.5.

Respondent's stand in their Affidavits

26. It is pertinent to note that this entire scheme

of increase of the authorised share capital was negotiated between the Respondents inter-se. We will let the first Respondent's affidavit narrate the alleged reasons for the scheme and the scheme itself. The same is in paragraphs 4 and 5 of the first Respondent's affidavit dated 5.4.2006 in the Appeal. These paragraphs assume importance for more than one reason. It would be convenient to set them out at this stage. They read as under :

> "(4) Some time in mid-March, 2006, Defendant No.6 representing all the shareholders of Defendant No.5 approached us and informed us that they were absolutely fed up with this litigation and that they had been caught in the crossfire between the Plaintiffs on the one hand and these Defendants on the other, while Defendant No.8 had invested huge amounts of his family money into the Project. Having entered into a commercial venture, Defendant No.5 and its shareholders had never expected to become victims of a family dispute and family litigation. Since the present equity was only Rs.19.01 crores as against a loan of Rs.64 crores, the debt equity ratio was very high, and therefore the lenders to the Project, HDFC Ltd. were insisting on the infusion of the required amount of fresh equity into the Project, as a condition to the continuation of the facilities offered by them for the Project. In this regard,

HDFC addressed a letter dated March 20th 2006 to Defendant No.5 stating that under any circumstances, the equity component should be increased before the financial year end, on March 31, 2006. Hereto annexed and marked **Exhibit "A"** is a copy of HDFC's letter. In view of the pending litigation, Defendant No.5 and its shareholders were naturally reluctant to infuse such a huge amount of further fresh equity into the Project through the Company. Further, the Marriott group of hotels, which was to eventually manage the operations of the hotel being constructed by Defendant No.5, was growing uneasy about the status of the Project, due to adverse media reports and speculation about the Project, arising from the messy and protracted pending litigation. Defendant No.5 knew of our existing relationship with the Marriott group, and was of the opinion that our involvement in the Project would quell their fears that the Project will not reach completion."

"(5) We thereafter negotiated that we would reenter the Project by acquiring equity shares in Defendant No.5 company. After considerable negotiations, we agreed to this commercial proposal. It was decided that Defendant No.5 shall make a fresh issue of equity shares aggregating to 8,10,00,000 new equity shares of Rs.10/- each **("New Shares")**. New equity amounting to Rs.74,50,00,000/- was to be issued and allotted to various investment companies owned and controlled by our family members

> **("Companies")** and Rs.6,50,00,000/- was to be allotted to Defendant Nos.8 and 9 against share application monies earlier brought in by them. The details of the allotment of the New Shares are at **Exhibit "B"** hereto. The Companies would subscribe to 7,45,00,000 New Shares for cash which would result in Companies holding 74.5% of the paid-up equity share capital of Defendant No.5 company while Defendant No.8 shall hold 20% and Defendant No.9 shall hold 5.5% of the paid-up equity share capital of Defendant No.5 company, respectively. My brother, myself, my daughter, Avni Raheja, my nephew, Aditya Raheja and Mr. Sunil Ahuja of Defendant No.8 would be appointed as additional directors of Defendant No.5 company looking after the day to day affairs and the management of the Company while guaranteeing certain investor protection rights to Defendants No.8 and 9. Since Defendants No.8 and 9 are to hold more than 25% of the paid-up equity share capital, no special resolution can be passed without their consent and concurrence. This was one of the pre-conditions insisted upon by Defendants No.8 and 9 before allowing us to enter the Project."

27. In paragraph 6 Respondent No.1 states that it is in the light of the above arrangement that the fresh allotment as stated above, was made.

28. It is not necessary to refer to the affidavits filed by the remaining Respondents each of whom confirms what is stated in the above affidavit of Respondent No.1. Several affidavits in reply and rejoinder have also been filed in the above Appeal in connection with the aforesaid resolutions. The same have been referred to and relied upon by all the parties during the hearing of the above Notice of Motion. Most of what is stated therein has been reiterated in the affidavits filed in the above Notice of Motion itself.

29. Thus far four things are clear.

Firstly, it is clear that by virtue of the aforesaid orders of this Court the Respondents were expressly restrained, inter-alia, from exercising any rights or receiving any benefits in respect of the shares.

Secondly, as admitted by the remaining Respondents, each one of them was aware of the aforesaid orders, being parties to the proceedings in which they were passed.

Thirdly, admittedly, the increase in the

authorised share capital of the company was pursuant to the exercise of the rights by Respondent Nos.6 and 7 at the, meetings held on 27.3.2006 and by Respondent No.6 at the meeting held on 31.3.2006, by passing the resolution increasing the authorised share capital.

Fourthly, the entire exercise of increasing the authorised share capital, allotting the shares issued pursuant thereto and the appointment of the new directors was carried out not merely with the consent but with the express agreement of each of the Respondents.

Submissions at the hearing

30. None of the counsel for the Respondents, contended that the aforesaid acts were not contrary to the plain or literal language of the order. Indeed, the plain/literal language of the order establishes beyond a shadow of doubt that the resolutions increasing the authorised share capital, were contrary to and in violation of the said orders. Respondent Nos.1, 2 and 3 in the last sentence of paragraph 5 of their respective affidavits in reply, in fact, implicitly accept this

to be so when they say: "The purpose and intent of the said orders therefore requires to be considered by this Hon'ble Court and not merely the literal language of the said orders ". Respondent No.6 on behalf of Respondent No.7 and himself has said the same thing in almost identical words.

31. The stand taken in the affidavits in reply by each of the Respondents is similar. They have contended in the first instance that there is no contempt. They then seek to explain and justify their conduct on various grounds. They tender an apology in the event of the Court not accepting these contentions. But, and this is important, there is not even a hint of a desire or an offer to purge the contempt. On the contrary, they make it quite clear that they ought not to be called upon to purge the contempt as that would cause irreparable harm to Respondent No.5, its shareholders and the project. We will deal with Mr.Chagla's offer/suggestion, the only redeeming feature of the Respondent's case, in its turn, viz. towards the end, which is when it was made.

32. Before us, Respondent Nos.1 to 4 took an aggressively defiant stand contending, on grounds we

shall deal with next, that no part of the said actions were in violation of the said orders. Counsel for Respondent Nos.5 to 9 took a relatively moderate stand. We did not understand any of the three counsel appearing for the different sets of Respondent Nos.5 to 9 to support the extreme stand taken by Respondent Nos.1 to 4. Counsel for Respondent Nos.5 to 9 contended that the Respondents were mistakenly made to believe that their actions would not be in violation of the orders. In view thereof, they contended that there was no wilful disobedience of the orders. Resisting the Notice of Motion their main contention is that no prejudice has been caused to the Appellants and that they have not benefited by their aforesaid acts.

Submissions on behalf of Respondent Nos.1 to 4 only:

33. We will first deal with those of Mr.Seervai's submissions which the counsel for the other Respondents did not adopt.

34. Mr.Seervai on behalf of Respondent Nos.1 to 4 contended in the first instance that the said resolutions were not in contempt of the said orders.

[A] The steps to his first submission in this regard were as follows :-

(i). A Court will not interpret an order in such a way that it prevents the performance of a statutory obligation by any of the parties to the order.

(ii). An order must be construed to at least exclude from it the discharge of mandatory statutory duties. The said order accordingly cannot be construed in such a manner that it would operate against the shareholders from exercising rights in respect of their shares, at least for the purpose of discharging their mandatory statutory duties. Thus, whatever be the literal interpretation of the order, the Court must read it down to exclude certain mandatory duties that a company is bound to discharge such as the appointment and reappointment of auditors and the holding of an Annual General Meeting.

(iii). Once it is found that an order may also have the effect of preventing the performance of a statutory duty, the entire order is, to use his words, "AT LARGE" and open to interpretation by the parties to it. This, he submitted as a proposition

of law, would be so, despite the fact that the plain language of the order calls for no interpretation as such.

(iv). Once an order is open to interpretation, a litigant is free to interpret it one way or the other and act upon such interpretation. In that event, such a litigant's conduct even in respect of actions other than those required to be performed by statute, cannot constitute contempt even if it is in violation of the literal/plain language of the order.

[B]. The second submission in this regard was that the orders are "confusing, unintelligible and meaningless." To make them "cogent, meaningful and intelligible" the Court must interpret them to exclude from their ambit the raising of the authorised capital if required for the Hotel Project.

35. The submissions are not only devoid of substance but, aggravate the contempt.

36. It is appropriate to preface a consideration of Mr.Seervai's submission by expressing our agreement

with two of Mr.Chinoy's submissions. Firstly, when the plain language of an order is clear, it is not permissible to look to extraneous circumstances to interpret the same. To hold otherwise would enable and encourage litigants to flout orders of the Court and justify their conduct even if held to be contrary to the order, on the ground that what they did was on their interpretation of the order. This would in many, if not most cases, render orders of the Court virtually nugatory.

37(a). In *Anil Ratan Sarkar & Ors. v. Hirak Ghosh & Ors., 2002 (4) Supreme Court Cases, 21,* the Supreme Court while observing that a plain reading of the order negated the understanding of the Respondent, held :

> "20. .....
> .....
> Even in the counter-affidavit, filed in the contempt petition, the understanding still continues - we are at a loss as to what is this understanding about: the defence of "understanding" undoubtedly is an ingenious effort to avoid the rigours of an order of the court but cannot obliterate the action - the attempted avoidance through the introduction of the so-called concept of lack of understanding cannot, however, be a permanent avoidance, though there may be temporary and short-lived gains. The order of this Court cannot

> possibly be interpreted as per the understanding of the respondents, but as appears from the plain language used therein. Neither is the order capable of two several interpretations nor is there any ambiguity and the same does not require further clarity. The order is categorical and clear in its context and meaning. The court's orders are to be observed in its observance, rather than in its breach." (emphasis supplied)

(b). Mr.Seervai sought to distinguish this judgment on the ground that the order was passed after six rounds of litigation and was based on the gross facts of the case. We are unable to ignore the ratio of the Supreme Court on these grounds. The ratio is not confined to gross cases. Nor is it confined to cases which arise only after several rounds of litigation.

38. Secondly, equally well founded, we find Mr.Chinoy's submission that even assuming that there was any doubt in the minds of the Respondents, and as we shall shortly demonstrate, they admittedly had at least a doubt, they ought to have approached the Court for a clarification or modification of the orders. Mr.Chinoy's reliance upon the judgments of the Supreme Court in this regard is well founded and constitute a complete answer to Mr.Seervai's

submissions. As we have demonstrated, in the present case, the order is clear. Indeed, on the plain language and literal interpretation thereof, not merely the counsel before us, but even the litigants themselves were of the opinion that what they did would be in contravention thereof. At the highest, even if they were to be believed, Respondent Nos.1 to 4 admittedly considered the order susceptible to interpretation. This is evident from the fact that they sought legal advice - an aspect we will have occasion to deal with later. In that event, they ought to have come to Court to seek a clarification and not to interpret the same in the self-serving manner in which they did and, thereby, violate the orders of the Court. That this is the course which ought to be adopted in such cases, is now well settled.

39. In *Major General B.M. Bhattacharjee (Retd.) & Anr. v. Russel Estate Corporation & Anr., (1993) 2 Supreme Court Cases, 533*, the Supreme Court in paragraph 11 held as under :

> "**11.** Mr.Dutta, the learned counsel for the respondents contended that the second respondent understood the allotment in a particular manner and that the said misunderstanding, if

> any, was bona fide. We are not prepared to agree. Firstly, there could not have been any doubt in the mind of respondent with respect to the meaning of the order. Secondly, assuming that he had any doubt regarding its meaning, the least he could have done was to ask for a clarification of the said order. He could well have represented that he had already entered into an agreement of sale on April 26, 1991 in respect of these flats and that he may be permitted to deliver possession and / or execute sale-deeds in respect of said flats in favour of third parties. He did nothing of the sort. Having placed a highly restrictive and unwarranted interpretation upon the order of this Court, he went ahead and not only delivered possession of the flats to third parties subsequent to the said order but also registered sale-deeds in their favour. He thus rendered the said order nugatory. It was not open to the respondents to place a convenient interpretation upon the order and proceed to act upon it, thereby totally nullifying the order of this Court." (emphasis supplied)

40. In *T.M.A. Pai Foundation & Ors. v. State of Karnataka & Ors., (1995) 4 Supreme Court Cases, 1*, the Supreme Court held as follows :

> "**8.** One fails to understand how the said direction in the order dated 13-5-1994 could be misunderstood by anyone. There was no question of any doubt arising as to its meaning nor did it call for any interpretation.
> .....
> .....
> It is thus evident that a doubt was sought to be created where there was

> no room for any doubt. It is equally clear that the doubt was inspired by the Association of Private Medical and Dental Colleges."
>
> "**9.** On a consideration of all the relevant facts and circumstances, we find no room for a bona fide error on the part of the officers concerned, viz., ... We are particularly pained by the role played by Shri. Mane and Shri. More in this matter. They are judicial officers of long standing. They have decades of judicial experience behind them. It is difficult to believe that they could make any mistake in understanding the orders of this Court which are worded in simple and unambiguous language. The least they could have done was to advise the Government to move this Court for a clarification."

41. In *S.K.Samsudin v. Ravikant & Anr., 1997, Cri.L.J., 1603* where, a learned Single Judge of the Calcutta High Court held :

> "The said order, such as it is, appears to be as clear and specific, as could be and does not require any prescience or perspicacity to understand the same. There could, therefore, be no scope for any confusion in respect thereof. Even so, if there was any confusion on the part of the Opposite parties in respect of the Court's said order, it was open to them to obtain clarification from the Court. It was certainly not for them to construe or interpret the Court's order, the way they liked, as they did by rejecting the prayer for grant of petitioner's

> permit to him on the grounds stated, thus attempting to circumvent the Court’s aforesaid order dated 14-11-95."

We are in respectful agreement with the above observations which require a party even in cases where there is any confusion, to obtain a clarification from the Court and that it is not for litigants to construe or interpret the Court’s order they way they like and thereby circumvent the effect of the orders of the Court.

42. Both on principle and on a parity of reasoning contained in the judgements we are clearly of the opinion that if according to a party an order is confusing or unintelligible or meaningless he is not entitled to interpret it in such manner as he likes and insist thereafter that the court ought to accept his interpretation or even that his interpretation is a plausible one. In that event a party ought to approach the court for a clarification.

43. With this, we return to Mr.Seervai’s submissions. Firstly, there is absolutely no bar to a Court granting an injunction restraining a

shareholder from exercising rights in respect of shares that he claims to own/hold. It happens ever so often such as in suits where there is a dispute as to the title to shares between the Plaintiffs and the Defendants, in rectification applications and in proceedings under sections 397, 398 of the Companies Act. The Court has the power to restrain the parties from exercising all rights in respect of the disputed shares. That, by itself, would not prevent a company from discharging its statutory obligations for there may be other shareholders through whom the same may be done.

44. We do appreciate that in the present case there were only four shareholders viz. Respondent Nos.6 to 9 and all of them have been restrained from exercising their rights in respect of the shares. The order certainly prevented them from exercising all rights without any qualifications. The proper and legal course for Respondent Nos.6 to 9 was to have come to Court, seeking a clarification or a modification of the order. It is certainly conceivable that the Court may have granted such an application permitting them to exercise rights in respect of the shares, to the limited extent sought by the Applicant. That however would have been

after hearing all the parties and possibly subject to terms and conditions. It is obvious that the Respondents did what they did precisely to avoid the same and to present the Appellants and the Court with a fait-accompli.

45. Even assuming that there is some substance in Mr.Seervai’s arguments viz. that the order ought not to be construed so as to prevent the exercise of voting rights to the extent of enabling the company to discharge its mandatory statutory obligations, the same would not absolve the Respondents of having exercised their rights in respect of the said shares even otherwise. It was rightly not even Mr.Seervai’s contention that there was any statutory obligation requiring the increase in the authorised share capital. That was a purely voluntary act for personal reasons unconnected with the discharge of any statutory or other obligations.

46. It is realising this difficulty that Mr.Seervai adopted the fourth and the fifth steps of his argument viz., that once an order is capable of being read down by the Court as suggested by him, the entire order is "AT LARGE", entitling a litigant to interpret it in such manner as he desired fit and

to act accordingly. And that once an order even in part prevents the discharge of a statutory function, the party is absolved from following the order altogether even in respect of matters which do not require the observance of or compliance with any statutory provisions.

47. Orders restraining shareholders from exercising their rights in respect of their shares are common. Anyone who has had anything to do with litigation involving disputes regarding shares, knows that. The submissions however are novel. We have absolutely no hesitation in rejecting them. Not surprisingly, our attention was not invited to a single judgment where the Court was required to consider such submissions. To accept these submissions would leave the field wide open to litigants to violate the orders of Courts the moment it could be demonstrated that the order in a hypothetical situation could have the effect of preventing the performance of statutory obligations. There is no principle of law or equity which supports such submissions. To accept the submission would be to set at naught innumerable such orders which are passed in litigations pertaining to shares.

48. In support of his submission, Mr.Seervai relied upon four judgments. We find not one of them relevant to the issue before us.

49(a). Firstly, he relied upon the judgment in the case of *Union of India & Anr. v. Kirloskar Pneumatic Co. Ltd., (1996) 4 Supreme Court Cases, 453.* In that case, the High Court had passed an order clause 3 whereof directed that the Union of India shall not reject the refund application under section 27 of the Customs Act, 1962 on the ground that it is time barred. The Appellant challenged the validity of this direction. Section 27 of the Customs Act provided for an application for refund to be within a period of six months from the payment of duty except in a case where it has been paid under protest. Further, under section 27, a claim for refund can be made only in accordance with the provisions of section 27. It was submitted on behalf of the Respondent that this was a usual order passed by the High Court in several matters. The Supreme Court held the direction to be contrary to law and observed as under :

"We do not think it is, even while

> acting under Article 226 of the Constitution. The power conferred by Articles 226/227 is designed to effectuate the law, to enforce the rule of law and to ensure that the several authorities and organs of the State act in accordance with law. It cannot be invoked for directing the authorities to act contrary to law. In particular, the Customs authorities, who are the creatures of the Customs Act, cannot be directed to ignore or act contrary to Section 27, whether before or after amendment. May be the High Court or a civil court is not bound by the said provisions but the authorities under the Act are. Nor can there be any question of the High Court clothing the authorities with its power under Article 226 or the power of a civil court. No such delegation or conferment can ever be conceived. We are, therefore, of the opinion that the direction contained in clause (3) of the impugned order is unsustainable in law."

(b). The question before us however, is not the validity of the orders of which contempt is alleged. We did not understand either Mr.Seervai or any of the other counsel to have argued that the order was void or even invalid. We are only concerned with the question as to whether the orders have been violated or not. The Supreme Court was considering the question of the validity/legality of the order and not the effect of any defiance or violation thereof.

(c). None of the counsel for the Respondents contended that the said orders are void. It is not necessary therefore for us to deal with the judgments of the Supreme Court in *Tayabbhai M. Bagasarwalla & Anr. v. Hind Rubber Industries Pvt. Ltd. etc., AIR 1997 Supreme Court, 1240* relied upon by Mr.Chinoy.

50(a). Mr.Seervai then relied upon a judgment of the Privy Council in *Surajmull Nargoremull v. Triton Insurance Company Limited, 52 IA, 126 (P.C.).* The judgment was approved by the Supreme Court in *AIR 1959, Supreme Court, 559* which we shall refer to next. Mr.Seervai relied upon the following observations :

> "The suggestion may be at once dismissed that it is too late now to raise the section as an answer to the claim. No Court can enforce as valid that which competent enactments have declared shall not be valid, nor is obedience to such an enactment a thing from which a Court can be dispensed by the consent of the parties, or by a failure to plead or to argue the point at the outset : *Nixon v. Albion Marine Insurance Co.* (1) The enactment is prohibitory. It is not confined to affording a party a protection, of which he may avail himself or not as he pleases. It is not framed solely for the protection of the revenue and to be enforced solely at the instance of the revenue

> officials, nor is the prohibition limited to cases for which a penalty is exigible."

(b). This judgment too is of no assistance in the present case. It was contended before the Privy Council that the question of law ought not to be allowed to be raised before the Privy Council as it was not raised before the lower Court. It is in this context that the above observations were made. We do not see the relevance of this judgment in the present case.

51(a). In *Badri Prasad & Ors. v. Nagarmal & Ors., AIR 1959, Supreme Court, 559* it was contended on behalf of the Appellant that by reason of section (2) of the Rewa State Companies Act, 1935, the cloth association was not a legal association because it was formed for the purpose of carrying on a business which had for its object, the acquisition for gain by the independent member thereof and further because it was not registered as a company under the said Act; nor was it formed in pursuance of its Charter from the Durbar. It was contended that by reason of the illegality in the contract of partnership the members of the partnership had no remedy against each other for contribution or

apportionment in respect of the partnership dealings and transactions and that therefore no suit for accounts lay at the instance of the Plaintiffs - Appellants. It was contended on behalf of the Respondent inter-alia that the preliminary objection ought not to be allowed to be raised at this late stage before the Supreme Court. Relying upon the above judgment of the Privy Council, the Supreme Court negated the contention. The Supreme Court held that section 42 being prohibitory in nature, cannot be excluded from consideration even though the bar of this contention had been raised at this late stage.

(b). We do not see the relevance of this judgment either. Mr.Seervai submitted that the judgment was relevant only for the purpose of demonstrating that a Court will not and cannot pass an illegal order. We reiterate that it was not the contention of any of the counsel on behalf of the Respondents that the said orders were illegal.

52(a). Lastly, in this regard, Mr.Seervai relied upon the judgment of the Supreme Court in *A.P.Christians Medical Educational Society v. Government of Andhra Pradesh & Anr., (1986) 2*

Supreme Court Cases, 667. He relied upon the following observations in paragraph 10 of the judgment :

> "**10.** Shri. K.K. Venugopal, learned counsel for the students who have been admitted into the MBBS course of this institution, pleaded that the interests of the students should not be sacrificed because of the conduct or folly of the management and that they should be permitted to appear at the University examination notwithstanding the circumstance that permission and affiliation had not been granted to the institution. He invited our attention to the circumstance that students of the medical college established by the Daru-Salam Educational Trust were permitted to appear at the examination notwithstanding the fact that affiliation had not by then been granted by the University. Shri. Venugopal suggested that we might issue appropriate directions to the University to protect the interest of the students. We do not think that we can possibly accede to the request made by Shri. Venugopal on behalf of the students. Any direction of the nature sought by Shri. Venugopal would be in clear transgression of the provisions of the University Act and the regulations of the University. We cannot by our flat direct the University to disobey the statute to which it owes its existence and the regulations made by the University itself. We cannot imagine anything more destructive of the rule of law than a direction by the court to disobey the laws."

(b). The question before us is not whether the said

orders are illegal and require the Respondents to disobey the provisions of the Companies Act but whether the Respondents had violated the said orders or not. The Supreme Court was not considering the question of violation of its orders. It would have been relevant had the Supreme Court passed the order in terms of the directions sought and the same had been violated and, in an action for contempt thereof, it had been contended that it was not necessary for the parties to obey the order of the Supreme Court as it required the disobedience of the statute. We asked Mr.Seervai whether it would have been open to the parties to disobey an order of the Supreme Court had it been passed in terms of the directions issued by the counsel. We heard no answer from him.

53. Faced with this, Mr.Seervai submitted that it follows as a corollary from the aforesaid four authorities that the Courts do not interpret orders in such a manner that the compliance thereof would lead to their performance of an illegality.

We have already dealt with this contention. Even assuming this contention to be well founded, in the facts of this case it is of no assistance to the

Respondents. Their acts complained of are not pursuant to any mandatory legal requirements.

54. It would be convenient while considering Mr.Seervai's next submission to set out again prayer (b)(iii) of the Notice of Motion in terms of which the order was passed :-

> (iii) The Defendants, their servants and agents be restrained by an order and injunction of this Hon'ble Court from alienating or encumbering the shares of Defendant No.5 Company or from exercising any rights or receiving any benefits in respect thereof." (emphasis supplied)

. Mr.Seervai submitted that the said order in so far as it grants prayer (b)(iii) is "confusing, unintelligible and meaningless". The Court ought therefore to place a purposive interpretation upon the order to make it "cogent, intelligible and meaningful".

According to him, the order properly construed, permitted the Respondents, to quote him, "to do all incidental acts to effectuate the purpose of development".

55. Mr.Seervai sought to support this submission on the ground that in prayer b(ii) the Appellant had sought an order restraining the Respondents even from developing the property. The Court however in the said order deleted the word "developing". He submitted therefore that the Respondents were entitled to do anything whatsoever if the same was for the purpose of development of the property. He submitted that to make the order intelligible and meaningful it would be necessary to rewrite the same to read, and we quote him verbatim, thus :

> "Defendants are restrained from exercising any rights in respect of the shares except if it is for the purpose of development"

. We are, to put it mildly, unable to agree. The submission is contrived and dishonest as we will now demonstrate.

56(a). The final operative order dated 25.10.2005 was, in fact, in the same terms as the earlier order passed with the consent of the parties on 17.1.2005. The order dated 17.1.2005 was passed with the consent and in the presence of counsel and

solicitors appearing for all the parties. Four separate sets of counsel and solicitors appeared for and represented the Respondents. Even more significant is the fact that the same counsel instructed by the same solicitors, appeared on behalf of Respondent Nos.1 to 4 on 17.1.2005, 22.3.2005 and 25.10.2005 when the same order was passed. On 17.1.2005 they consented to the order.

(b). It was not contended that Respondent Nos.1 to 4, their counsel and solicitors did not apply their minds before consenting to the order. Nor did Respondent Nos.1 to 4 state when they found/realised the orders to be confusing, meaningless and unintelligible.

(c). If the orders were confusing, unintelligible and meaningless, as contended by Mr.Seervai, we would have expected the same to have occurred to at least one of the parties during the last eighteen months.

57. Indeed, the affidavits filed by the Respondents did not seek to support the conduct on this ground. We did not hear either Mr.Chagla or Mr.Khambata or Mr.Doctor to support Mr.Seervai in this contention.

The reason is simple. The orders were in fact clear. Every counsel, every solicitor and every party before us considered the orders to be clear. Mr.Seervai's argument must be rejected as an after thought. The "confusion" is contrived in an endeavour to justify the otherwise indefensible conduct.

58. In fact, this submission of Mr.Seervai's makes matters worse for Respondent Nos.1 to 4 for if, according to them, the orders were confusing, unintelligible and meaningless, they ought to have come to Court for a clarification or a modification thereof instead of taking it upon themselves to interpret the orders to make them cogent, intelligible and meaningful. It is not permissible for parties to rewrite orders of the Court in their minds to make them "cogent, intelligible and meaningful" and to act in accordance with such re-written orders.

59. The submission, as we have stated earlier, was based on the ground that in prayer b(ii) the Appellant had sought an order restraining the Respondents even from developing the property. The Court however in the said order deleted the word

"developing".

60. The argument needs only to be stated to be rejected. It must be noted that prayer (b)(ii) pertains to the property viz. the said land purchased from UB, whereas prayer (b)(iii) pertains to the shares of Respondent No.5.

61. If this argument were to be accepted, it would entitle the Respondents to violate the entire order in every respect and justify the same by contending that the same was for the development of the property. If the argument were to be accepted, the Respondents would be entitled to alienate and encumber their shares though they were expressly forbidden to do so, so long as the alienation or encumbrance was for the development of the property. For instance, the Respondents could encumber the shares by pledging them to secure a loan for the development of the property. In the event of default the pledgee could sell the shares to another third party thereby altering the entire status quo sought to be preserved by the said orders.

62. Mr.Seervai agreed that the same could not be done. He, however, stated that this was because the

words "alienating" and/or "encumbering" were specific restraints whereas the restraint, in so far as it related to exercising any rights in respect of the shares was vague. We fail to understand what is vague about the expression. It is plain, clear and in simple English.

63. In fact, Respondent No.1 in paragraph 7 of his affidavit in reply has gone even further contending as follows :

> "7. I say that from the consent order dated 17th January 2005, it is clear that the parties had agreed that Respondent No.5 Company and its shareholders were to continue to operate so as to develop the property described in Exhibit "A" to the Plaint and continue with the construction thereon and the operation of the Company but were not to part with possession of the said property of the existing shares held by the shareholders of Respondent No.5 Company. I respectfully say and submit that it was always understood by me that the order obtained by consent of parties on 17th January, 2005 was not to hamper progress of the development work in any manner. I say that I bona fide believed that the actions taken at the meetings on 27th March 2006 and 31st March 2006, which were taken to keep the hotel project alive and continue the development, did not amount to a breach of the order dated 17th January 2005."

64. Mr.Seervai admitted that this was in fact too wide an interpretation and attributed the same to poor drafting. We are unable to agree. The parties themselves have not said so anywhere. The Respondents appear to have adopted a totally convoluted line of reasoning in order to justify their conduct.

65. The answer to this contention is obvious. The Respondents were not restrained from the developing the property. They were free to do so but they were not free to do so in any manner that they desired. They were free to do so in any manner except as prohibited by the said orders. They were not free to do so in violation of the said orders. For instance, they were free to arrange loans for the said purpose. Nothing prevented them from doing so.

66. Mr.Seervai submitted that Respondent Nos.1, 2 and 3 had taken legal advice before accepting the allotment of the said shares. The same is mentioned in paragraph 10 of the first Respondent’s affidavit in reply.

67. We analysed the paragraphs carefully. Nowhere has it been stated that Respondent Nos.1, 2 and 3 sought advice regarding the actual resolutions increasing the authorised capital. In fact, Mr.Seervai stated that the paragraphs have been very carefully drafted to say exactly that viz. that the advice sought by Respondent Nos.1, 2 and 3 and the advise given to them was only with respect to the actual allotment of the shares and not as to whether the exercise of voting rights for the increase in the share capital, was in violation of the order or not.

68. Firstly, we find it extremely difficult to believe that Respondent Nos.1, 2 and 3 sought such compartmentalised and restricted advice viz. only regarding the allotment. To us, it seems obvious that they must have sought advice regarding the entire transaction including whether the act of exercising rights in respect of the original shares to increase the authorised capital would be in violation of the order or not. This is indicated by the fact that the advise was sought in February, 2006 i.e. much before the resolutions dated 27.3.2006 and 31.3.2006 increasing the authorised capital.

69. Here we see a silver lining. The legal advisers have neither stated nor permitted Respondent Nos.1, 2 and 3 to state that they advised that the said act would not be in breach of the said order. We appreciate their upholding the tradition of the bar in refusing to lend their names to or to endorse such patently contumacious acts.

70. Finally, Mr.Seervai submitted that if none of these arguments appeal to us he would be willing to tender an apology. A little too late and very grudgingly, we think, came this apology. Moreover, there was not even an offer to purge the contempt. The apology then is meaningless.

Submissions on behalf of all the Respondents :

71. This brings us to a consideration of the following submissions made on behalf of the other Respondents which were also adopted on behalf of Respondent Nos.1 to 4 :-

i) The Respondents bona-fide misinterpreted the order.

ii) The Respondents were unable to make an application for clarification or modification of the order due to paucity of time.

iii) The Respondents have not derived any benefit by their acts.

iv) The Appellants have not suffered any prejudice by the Respondents acts.

v) The Respondents were not bound by the orders, as they were inoperative in view of the Appellants not having complied with the provisions of Rule 148 of the Bombay High Court (Original Side) Rules, 1980.

vi) Respondent Nos.8 and 9 cannot be held to have committed contempt of the orders as they had not attended the meetings at which the impugned resolutions were passed.

i) **The Respondents bona-fide misinterpreted the order :**

72. Mr.Chagla did not, on behalf of Respondent Nos.5, 6 and 7, adopt the stand thus far taken by

Respondent Nos.1 to 4. He, however, sought to explain why the Respondents did what they did. Mr.Chagla did not contend, that the omission of the word "development" in prayer b(ii) established the interpretation of the order, as contended by Mr.Seervai viz. that the Respondents were thereby entitled to exercise rights in respect of the shares, in the manner in which they did. What Mr.Chagla suggested was that it was for this reason that Respondent Nos.5, 6 and 7 mistakenly presumed that they were entitled to do what they did.

73. It is difficult to accept this explanation. It is inherently improbable that any of the Respondents genuinely believed that their acts were not contrary to the order in letter or in sprit. The Respondents are all seasoned businessmen. They are seasoned litigants. They have the benefit of a galaxy of counsel and solicitors. The orders had been in operation for over a year when the resolutions were passed. Legal advice was in fact sought, admittedly, by Respondent Nos.1, 2 and 3. The entire scheme/arrangement was agreed to between all the Respondents. Not one of the legal advisers endorsed the arrangement stating that it would not be contrary to the said order.

74. There is another fact that belies this contention. If the Respondents were genuinely of the view that the resolutions were not in breach of the said orders, one wonders why they filed affidavits on 5.4.2006 in this Court disclosing the details thereof. The tenor of the affidavit makes it clear that the information was furnished therein because the Respondents were well aware of the fact that the Appellants would sooner rather than later discover the entire scheme. It is also clear to us that the Respondents were aware of the fact that their actions were in violation of the said orders. If they were not so aware, there was no need for them to have filed these affidavits.

75. If there is any doubt left, it is removed by a reference to paragraph 9 of the affidavit of Respondent No.1 dated 5.4.2006 in which he offers an undertaking as follows :

> "(9) Until further orders of this Hon'ble Court in the matter, my brother and I undertake to this Hon'ble Court to ensure that the Companies shall hold the New Shares in terms of the existing order relating to the shares held by Defendant Nos.6, 7, 8 and 9 and/or as may be directed by the

> Hon'ble Court and my brother and I shall file undertakings in this Hon'ble Court to the said effect. I will ensure that the Companies will file undertakings in this Hon'ble Court within such time and in such terms as may be directed by this Hon'ble Court."

If, according to the Respondents, the said orders did not prevent the concerned Respondents from exercising their rights in respect of the said shares for the purpose of raising the authorised capital of Respondent No.5, where was the question of their offering any undertaking as above. This is a clear indication that the Respondents are guilty of wilful breach of the said orders.

76. Mr.Chagla submitted that the parties were aware that the project was to be financed not merely by debt but by equity as well. He relied upon the feasibility report which indicated the same.

77. This could not possibly exempt the Respondents from obeying the orders of this Court. Merely because the parties had initially contemplated financing the project by equity as well as by debt, even presuming that the financing for the project ran into difficulty on account of the said orders,

it would make no difference whatever. The order prohibited the Respondents in a particular manner. If the same caused difficulty, it was open to the Respondents to challenge the same. It was open for them alternatively to seek a modification of the order. It was open to them to seek a clarification of the orders. It was open for them to make an application to have the order set aside. It was however not open to them to ignore the orders, which is exactly what they have done.

It would be useful to refer to the following observations of the Supreme Court in *Prithavi Nath Ram v. State of Jharkhand (2004) 7 Supreme Court Cases, 261 :*

> "8. If any party concerned is aggrieved by the order which in its opinion is wrong or against rules or its implementation is neither practicable nor feasible, it should always either approach the court that passed the order or invoke jurisdiction of the appellate court. Rightness or wrongness of the order cannot be urged in contempt proceedings. Right or wrong, the order has to be obeyed. Flouting an order of the court would render the party liable for contempt. While dealing with an application for contempt the court cannot traverse beyond the order, non-compliance with which is alleged. In other words, it cannot say what should not have been

> done or what should have been done. It cannot traverse beyond the order. It cannot test correctness or otherwise of the order or give additional direction or delete any direction. That would be exercising review jurisdiction while dealing with an application for initiation of contempt proceedings. The same would be impermissible and indefensible. In that view of the matter, the order of the High Court is set aside and the matter is remitted for fresh consideration. It shall deal with the application in its proper perspective in accordance with law afresh. We make it clear that we have not expressed any opinion regarding acceptability or otherwise of the application for initiation of contempt proceedings."

78. It is quite apparent that the Respondents entered into the said scheme/arrangement fully aware that it was contrary to the said order. They did so confident in their presumption that once they had invested an amount of Rs.100 Crores, no Court would ever turn the clock back. They did so to present the Court with a fait-accompli.

ii) **The Respondents were unable to make an application for clarification or modification of the order due to paucity of time :**

79. We asked Mr.Chagla why, if Respondent Nos.5, 6 and 7 had any doubts as to the purport of the order,

they did not approach the Court for a clarification. Mr.Chagla fairly stated that they ought to have done so. But, he offered an explanation for their not having done so. The explanation he offered was, in fact, the one contained in the affidavit of Respondent No.6. Relying upon paragraph 9 of an affidavit dated 25.4.2006 filed by Respondent No.6 in the Notice of Motion, he submitted that the resolutions were required to be passed in such haste due to the requirements of HDFC. It is now established that this portion of the affidavit of Respondent No.6 is not merely incorrect but false and made with the specific intention of raising the very plea presently under consideration.

80(a). As we are of the view that these averments were calculated to mislead, it is necessary that we set them out verbatim. They read as follows :-

> "9. ..... When the hearing of the above Appeal was adjourned on 3rd March, 2006 to 12th April, 2006, HDFC Limited, which is the lender to the project, had not threatened to recall its loan facility. Subsequently, HDFC started putting immense pressure on Respondent No.5 and finally by its letter dated 20th March, 2006 required Respondent No.5 to raise the equity share capital in the

> Company latest by 31st March, 2006 failing which, HDFC Limited threatened to recall the Line of Credit loan facility of Rs.64 crores granted to finance the Company's hotel project. I say that there was, therefore, no option but to act quickly within the short time available with the shareholders and management of Respondent No.5. ...."

(b). It is important to note here that supporting Mr.Chagla in this regard, Mr.Seervai, in turn, relied upon paragraph 4 of the first Respondent's affidavit dated 5.4.2006, which we extracted earlier. In paragraph 4 it is stated that the shareholders of Respondent No.5 approached Respondent Nos.1 to 3 "some time in mid-March 2006" expressing their concern about the future of the project in view of the litigation. It is further stated that HDFC by its letter dated 20.3.2006 insisted upon the increase in equity by 31.3.2006.

In paragraph 5, Respondent No.1 states :

> "(5)<u>We thereafter</u> negotiated that we would reenter the Project by acquiring equity shares in Defendant No.5 company. After considerable negotiations, we agreed to this commercial proposal."

81. A conjoint reading of the above extracts from the two affidavits was relied upon to contend that it was in mid-March 2006 that Respondent No.6 approached Respondent No.1 and that the negotiations took place thereafter.

82. In fact, this aspect was emphasised by all the learned counsel appearing on behalf of the Respondents while answering our query as to why they did not seek permission from the Court for increasing the share capital. They specifically relied upon the letter dated 20.3.2006 addressed by the HDFC and the above affidavits to contend that there was no time to do so.

83. The case regarding paucity of time to approach this Court for a clarification, is belied by more than one factor.

84. Firstly, and this is most serious, the explanation is in fact false and, now demonstrated to be false. Respondent Nos.1 and 2 in paragraph 10 of their affidavit in reply dated 25.4.2006 filed in the Notice of Motion, probably forgetting what they stated in paragraph 5 of their earlier affidavit dated 5.4.2006 (extracted above), have stated as

under :-

> "10. I say that at the end of February, 2006, i.e. prior to the Extra Ordinary General Meeting of 27th March, 2006, at which Extra Ordinary General Meeting the authorised share capital of Respondent No.5 was raised, I (together with Respondent No.2) specifically sought legal advice. The legal advice we sought was as to whether the allotment of shares to us, or to our family members, or to our family companies, by the Board of Directors of Respondent No.5, consequent upon the proposed increase in the authorized capital of Respondent No.5, (hereinafter, referred to as "allotment") would constitute a breach of the said orders of this Hon'ble Court; ...."

85. It is thus clear that this entire scheme was thought of, discussed, negotiated and decided to be implemented at prior to end-February, 2006. The suggestion before us that it was upon receipt of HDFC's letter dated 20.3.2006 is clearly false. Admittedly, the legal advise sought at the end of February, 2006 pertained to the proposed increase in the authorised capital of Respondent No.5. Thus, by the end of February, the increase was already proposed. The case of paucity of time is false.

86. When we put this to Mr.Seervai, who, incidentally addressed us after Mr.Chagla, he admitted this to be serious and stated that he would revert after considering this aspect. We heard nothing from him thereafter. Nor did we hear anything from Mr.Chagla in this regard thereafter. Neither Mr.Khambata nor Mr.Doctor who argued after Mr.Seervai, on behalf of Respondent Nos.8 and 9 respectively offered any explanation.

87. These averments, we are constrained to say, are not merely incorrect, but false. They have been made with a clear intention of misleading the Court into believing that the Respondents were unable to approach the Court earlier due to paucity of time.

88. Secondly, we reject the argument that the letter dated 20.3.2006 justified the Respondents acting in breach of the said order or that the same did not permit them enough time to seek the permission of the Court to do so. The resolutions were passed only on 27.3.2006 and 31.3.2006. Nothing prevented them from coming to Court between 20.3.2006 and 27.3.2006.

89. The Respondents have not contended that upon

receipt of the letter dated 20.3.2006 from HDFC they requested HDFC to wait for only a few days to enable them to seek a clarification from this Court. HDFC is one of the most respected financial institutions of this country. There is nothing to suggest that had such a request been made by the Respondents, HDFC would not have extended the alleged deadline.

90. We hasten to add that even if the HDFC had refused to accede to such a request, it would not have justified the Respondents violating the said order. What we have stated is only to demonstrate the inherent improbability of the Respondent's defence regarding paucity of time.

91. The contention that the Respondents were unable to approach this Court to seek a clarification and/or a modification of the said orders due to paucity of time as a result of HDFC's alleged insistence, is rejected both in principle and on facts.

iii) **The Respondents have not derived any benefit by their acts :**

92. It was then contended by all the counsel on

behalf of the Respondents that the increase in the share capital and the consequent allotment of the additional shares conferred no benefit or advantage to their respective clients. They submitted that the issuance of shares was solely with a view to comply with HDFC's requirement of maintaining a debt equity ratio and that the Respondents did not propose deriving any benefit by virtue of the allotment of the said shares.

93. The submission is demonstrably unfounded.

Respondent No.5 itself obviously derived benefit by having received a sum of Rs.81,50,00,000/- pursuant to the impugned resolutions passed contrary to, and in violation of the injunction. Nothing more need be said regarding the benefit to Respondent No.5.

94. It cannot be contended by any stretch of imagination that Respondent Nos.1, 2, 3, 8 and 9/their group / associate companies, did not derive any benefit by having received 81,50,000 shares and Directorship/control of Respondent No.5 in breach of the injunction. They cannot possibly be heard to say that they did not benefit thereby, in commercial

terms. They quite obviously did.

95. The zeal with which they defended their action and their reluctance to purge the contempt, itself establishes the same. If they indeed have not derived any benefit, why is there such reluctance on their part to annul the entire process. The answer is obvious. The Respondents have derived enormous benefit by the allotment of the said shares.

96. Admittedly, the allotment of shares was part of a composite deal. In consideration of Respondent Nos.1 to 3 subscribing to the shares they were to be placed in management of Respondent No.5. Respondent No.6 in paragraph 4 of his affidavit dated 10.4.2006 in the Appeal, stated thus :

> "In the aforesaid circumstances more particularly described in the affidavit of Respondent No.8 dated April 5th, 2006, I was constrained to approach Respondent No.1 with the proposal to invest in the Hotel Project. After the new shares have been issued, the new directors have started to manage the affairs of Respondent No.5 and to look after the Hotel Project. The lenders to the Hotel Project have been informed of their appointment and the infusion of the required amount of equity."

The value of being in management does not require any elaboration. We see no reason why we ought to presume in favour of the Respondents that they derived no benefit by having been allotted the said shares. The benefit is too obvious to require any explanation.

97. What makes matters worse is that in the affidavit filed by the Respondents, not once has there been an offer to purge the contempt. In fact, a positive stand is taken that even if the Court comes to the conclusion that there has been a violation of the order, the Respondents ought not to be called upon to purge the contempt as that would not be in the larger interest of Respondent No.5, its shareholders and the project. This is clear inter-alia from paragraph 12 of the affidavit in reply filed by Respondent No.6 in the above Notice of Motion and paragraph 4 of his affidavit dated 10.4.2006 filed in the Appeal.

iv) **The Appellants have not suffered any prejudice by the Respondents acts :**

98. On behalf of the Respondents, it was also

submitted that in any event, no prejudice was caused to the Appellant by the Respondent's said acts. This contention was based on several grounds. It was submitted that the Appellants, in any event, were not in management. Therefore, the increase in the authorised capital would not prejudice the Appellant's rights to jointly exploit the project if the Appellants were to finally succeed in the Appeal or in the suit. Secondly, the Appellants would in fact be benefited by the said acts of the Respondents as the Respondents had invested about Rs.81 Crores and obtained further funds of Rs.64 Crores from the HDFC Bank. The project was therefore kept alive and in the event of the Appellants succeeding in the Appeal or in the suit, they would be entitled to walk in at the price of only the face value of the shares. The shares they submitted would abide by the result of the suit. Lastly, it was submitted that, in fact, it is the Respondents who have been prejudiced as it is they who have invested about Rs.81 Crores and offered that the newly allotted shares would also abide by the same restraint order qua the original shares.

99. Mr.Chinoy submitted that prejudice to the Appellant/Plaintiff is inherent in a

restraint/prohibitory order granted in his favour being violated by the contemnor. An injunction is granted by a court to protect the rights and interests of the Plaintiff/Applicant. The question of benefit and prejudice is dealt with and exhausted once the Court makes a restraint/prohibitory order.

100. The submission is well founded upto the stage of the order. It is axiomatic that an injunction is granted to prevent the prejudice which the Court believes that a party is likely to face. In other words, the Court grants an injunction to ensure that a party does not face prejudice or harm in the absence of such an order being passed.

101. Mr.Chinoy further submitted that a contemnor cannot violate a restraint/prohibitory order and when faced with action for disobedience/contempt, require the Contempt/enforcement Court to consider aliunde whether a benefit has accrued to him from the breach, or contend that no prejudice had been suffered by the Plaintiff/Applicant by such breach. Issues of benefit and prejudice are subsumed by the earlier restraint order. The Contempt/enforcement Court has to act only in the context of the order already made (and which has been violated) - not

aliunde. The Contempt/enforcement Court cannot be asked to consider aliunde whether justice is served by enforcing the order, or whether breach of the order would cause prejudice.

102. It is difficult to accept this submission as an absolute proposition of law. There may arise various situations in which despite the breach of an order the Court may, considering the facts and circumstances of the case as well as the nature and consequences of the breach, refrain from taking action for contempt thereof.

103. For instance, in an application for attachment before judgment under Order XXXVIII Rule 5 of the C.P.C., the Court may instead of attaching the Respondent's property, merely restrain the Respondents from selling or disposing of a particular asset. If, despite the same, the Respondent sells the property, it would undoubtedly be a breach of the order and the Respondent would be liable for contempt. However, the Court may well refrain from taking any action against him in certain circumstances. If, for instance, the suit in which the order had been passed, was only to recover money and the Respondent had sold the said

property for an amount higher than the amount claimed in the suit and tendered the suit claim in Court the Court would not be bound to take action against him for contempt if it came to the conclusion that the sale was in fact for the purpose of securing or satisfying the claim in suit, the facts and circumstances warranted the immediate sale of the property and that the sale was not to overreach the Court or its orders.

104. We are unable to agree with Mr.Chinoy that the Court has no power or jurisdiction to consider the nature of the breach in contempt proceedings even on the question of prejudice. We hasten to add that we do not wish to be understood as saying that the moment absence of prejudice is shown, the party would be absolved of having committed a breach of the order. It would depend on the facts and circumstances of each case.

105. Having said that, we must add that the burden would lie very heavily upon the party in breach of the order, to establish that no action ought to be taken against it for this reason. The presumption always must be that the violation of the order is to the prejudice of the party in whose favour it is

passed and, for the benefit of the party against whom it was passed.

106. Further, the case must be so clear that it would be apparent without any detailed investigation that the contemnor has not derived any benefit or that the other party has suffered no prejudice. This is but a logical sequitur of the principle that orders of the court must be observed and it is only in rare case that such defences may be entertained. It is not open to a party to commit contempt of the orders of the court and then expect the court to involve itself in a detailed investigation as to whether or not prejudice has been caused to the party in whose favour the order has been passed. To hold otherwise would leave the field wide open for parties to disobey the orders of the court. It would be detrimental to the rule of the law and to the sanctity of the orders of the court.

107. In this matter the Respondents have not made out any such case. They however contended that the absence of prejudice is evident from various factors.

108. Firstly they submitted that the Respondents

had while bringing the facts pertaining to the said resolutions to the notice of the court by their affidavits dated 05.04.2006 stated that the new equity shares would be held by the respective Respondents in terms of the order dated 25.10.2005 and the interests of the appellants are thereby protected.

109. This is rather presumptuous on the part of the Respondents. The rights of the parties are protected by the court. Once the court protects the interests of the parties in a particular manner, it is not open to the other party to act contrary to the order and then justify its action by purporting to secure the interest of the party in whose favour the order was passed in such manner as it deems fit. This is the jurisdiction of the court. No litigant, whoever he may be, is entitled to usurp it, which is what the Respondents have done. Had an application been made to court to raise the authorised capital it is the court that could have permitted the same subject to such conditions that the court thought fit.

110. For the same reason nor do we find any substance in the next submission. Relying upon

paragraphs 4 & 5 of the affidavit of Respondent No.6 dated 18.04.2006, it was contended that the Respondents had provided adequate safeguards to protect the interests of the petitioner. It is stated by Respondent No.6 that Respondent No.5 had entered into a Technical Services Agreement and an Operating Agreement both dated 11.08.2004 with Marriott International, USA, under which Marriott is to exclusively manage and operate the hotel. There are various averments to the effect that the hotel is to be planned, designed, constructed, furnished and equipped in accordance with Marriott's standards, time schedules and design documents to be approved by Marriott and that the hotel is to be operated and managed exclusively by Marriott without interference from the company for the period of thirty years.

111. The argument is curious to say the least. It is true that Marriott International is one of the most reputed companies in the world in the hospitality industry. We have no reason to doubt the high standards of efficiency and integrity that Marriott is stated to maintain. The aspect is however irrelevant to the question under consideration. What we again find particularly

objectionable is the presumptuous attitude of the Respondents. Contemnors cannot be heard to tell the court that no action ought to be taken against them as they have provided safeguards which protect the interest of the appellants. They are nobody to do so. If we were to accept submissions such as this it would permit every litigant to violate the orders of this court and successfully defend their action by furnishing what they consider to be adequate safeguards.

112(a). Then came an extraordinary contention. It was submitted that in fact by the aforesaid resolutions and the consequent issue of shares it is the Respondents who subscribed to these new shares who are prejudiced and not the Appellants. The contention was based on the ground that the Respondents had contributed an amount of over Rs.80 crores and had obtained funding from HDFC in the sum of Rs.64 crores, whereas the Appellants had not contributed anything.

(b). The argument merely requires to be stated to be rejected. Nobody asked the Appellants to invest the money. Nobody forced the allottees of the new shares to subscribe to or accept the allotment of

the new shares. It was really a little too ambitious for the Respondents to have expected anybody to believe that they invested over Rs.80 crores to their prejudice and did not derive any benefit by the investment.

(c). We put the Respondents to the obvious test by asking them whether they would allot the said shares to the Appellants on the Appellants paying the like amount for the same and to have their investment of over Rs.80 crores returned. The answer not surprisingly, was in the negative. Nothing more need be said about the sheer untenability of the submission.

113. It was submitted that the scales of justice are tipped in favour of the Respondents as the project would remain the same namely a hotel project with the participation of Marriott. The Appellants would therefore also suffer no prejudice.

We do not see how that tips the scales of justice in the Respondent’s favour or how this fact is at all relevant to the question of contempt.

114. It was submitted that the purpose of the

appellants suit would be defeated if the resolutions were set aside. The Appellants would then not get 50% shares in any company. Thus, the appellants would suffer prejudice if the resolutions are set aside.

115. Apart from the fact that this factor too does not tip the scales of justice in the Respondents favour, the basis of the submission is incorrect. Merely because the project may not come up it would not mean that the appellants would not be entitled to any reliefs or that the reliefs if granted would be meaningless. If the appellants succeed they would still get a 50% share in the company, Respondent No.5, which in turn would be the owner of the property. The fact that the project may not materialize today does not mean that the property is not in existence or will be of no benefit to the company in future.

116. The next factor relied upon was that Respondent Nos.6 to 9 in any event could have changed the management of Respondent No.5 even without issuing the new shares by appointing Directors.

117. That they could have done so does not absolve them of having issued shares when they were specifically restrained from doing so. They may have been able to do many things regarding the management and the running of Respondent No.5 without raising the authorised capital and issuing new shares. That does not excuse them from disobeying the orders of this Court.

118. Mr.Chagla relied upon a judgement in the case of Ashok Paper Kamgar Union V/s. Dharam Godha (2003) 11 SCC 1 (paragraph 17) in support of his contention that before holding a party guilty of contempt it is necessary for the court to come to conclusion that there was wilful disobedience of the order. In view of our conclusion that the Respondents have wilfully disobeyed the order dated 25.10.2003 the judgement is of no assistance to Mr.Chagla.

119. For that reason nor is the judgement in Ashok Kumar Singh V/s. State of Bihar (1992) 1 SCC 152 (paragraphs 9 & 10) of any assistance to Mr.Seervai who relied upon it in support of the proposition that so long is the misinterpretation was not wilful action for contempt of court is not called for. In

view of our conclusion that the order dated 25.10.2005 is clear; that there was no question of any doubt arising as to its meaning; that it did not call for any interpretation and that the so called doubt was contrived, the judgement is of no assistance to Mr.Seervai. In that case the Supreme Court came to the finding that the order had not been wilfully misinterpreted.

120(a). Mr.Chagla relied upon an unreported judgement dated 20.07.1999 of a learned Single Judge of this court in BEAG and Ors. V/s. Rupa Investment Ltd. and Ors. in Contempt Petition No.61/1999 in Writ Petition No.2065/1996 in support of his contentions that even if the court comes to the conclusion that there is a breach of an order, it is not bound to set at naught actions performed in breach of the said order.

(b). The judgement clearly is of no assistance to Mr.Chagla even assuming that the submission is well founded. It would depend upon the facts of each case as to whether such actions should be set aside or not. The learned Judge did come to the conclusion that the construction put up by the Respondent was in breach of the orders of the court.

The Respondents therein had tendered an unconditional apology and gave an undertaking inter-alia that they would remove the construction if so ordered at the final hearing of the Writ Petition and would not claim any equity by reason of such construction. The learned Judge accepted the unconditional apology tendered by the Respondents.

(c). It is important to note however that the learned Judge did not permit the Respondent to occupy that part of the building which was constructed in breach of the order.

(d). The Contempt Petition was taken out in a Writ Petition. At the final hearing of the Writ Petition, the Respondents could well be ordered to remove the construction. In the present case if Respondent No.5 is permitted to utilize the funds received pursuant to the allotment of the shares, it will be impossible to set the clock back. This would be so even if the shares themselves are frozen today as suggested by Mr.Chagla and the Respondents do not claim ownership in respect thereof pending the hearing and final disposal of the suit.

(e). If we were to permit this the entire purpose

of the injunction would be frustrated and the stratagem adopted by the Respondents would succeed thereby undermining the sanctity of the orders of this court.

121. The above judgement was carried in Appeal by the Respondent. By an unreported judgement dated 09.03.2000 in Appeal No.1056/1999 the Division Bench accepted the interpretation placed on the order by the Respondent/Appellant. That is not the case here. The judgement, therefore, is of no assistance to the Respondents. Nor is the reliance upon paragraph 10 of the judgement of any assistance to them. The Division Bench in paragraph 9 of the judgment observed that the matter pertained to a public interest litigation and that the court had to balance between two conflicting interests namely demand for public interest for compliance with laws as against the fact that there was already construction upto the fifth floor. The Division Bench came to the conclusion that by restraining the Respondents from occupying the building public interest would not be advanced. It is important to note that the Division Bench too observed that if the petition were to succeed, public interest may demand the razing of the building but that would

have to be postponed till the final hearing. As observed by us while dealing with the judgement of the learned Single Judge, in the present case if Respondent No.5 is permitted to use the funds raised by the allotment made pursuant to the impugned resolution it would be impossible to set the clock back. The observation in paragraph 10 to the effect that the learned Single Judge rightly accepted the unconditional apology and the undertakings without holding them guilty and punishing them were made in the facts of that case. There is no discernible ratio in these observations. In any event in the facts and circumstances of this case we are not inclined to permit the Respondents to take advantage of their own wrong.

v) **The Respondents were not bound by the orders, as they were inoperative in view of the Appellants not having complied with the provisions of Rule 148 of the Bombay High Court (Original Side) Rules, 1980 :**

122. Mr.Chagla submitted that the Respondents were not bound by the said orders as the Appellants had not complied with Rule 148 of the Original Side Rules of the High Court at Bombay. In this regard,

he relied upon a judgment of a Division Bench of this Court in *Murablack India Ltd. v. UBS AG & Ors., (2005) 12 LJ Soft 235*. In paragraphs 15 and 16, the Division Bench held as under :

> "15. Rule 148 of the Original Side Rules of the High Court at Bombay reads as under :-
>
> > "148. A party to whom interim relief has been granted shall, before the order is issued, unless the Court otherwise directs, give an undertaking in writing or through his Advocate to pay such sum by way of damages as the Court may Award as compensation in the event of a party affected sustaining prejudice by such order."
>
> "16. Our reading of the Rule is that this rule would apply in all cases where interlocutory relief ad interim or interim is granted and the Prothonotary & Senior Master should not issue the injunction order under the seal of this Court unless the undertaking stipulated in Rule 148 has been given. In the present case, admittedly such undertaking has not been given. Mr.Thakkar contends that because at the time when the Notice of Motion was moved for ex parte orders, there is an order made saying that leave under Rules 147/148 had been granted by the Court, it should be presumed that the Court has exempted the appellant (original

> defendant No.1) from giving the undertaking contemplated by Rule 148. In our view, this is a very unsatisfactory way of doing things. That the undertaking contemplated by Rule 148 applies to all interim reliefs, ex parte or otherwise, is settled law in this Court. (See in this connection the judgment of the learned Single Judge in (*Bank of Maharashtra v. M.V. River Ogbese*), 1989(3) Bom.C.R. 452 : A.I.R. 1990 Bombay 107, with which we fully agree)."

123. We do not read either Rule 148 or the judgment as absolving parties from obeying interim orders of this Court in the event of the undertaking as per Rule 148 not being furnished. It is indeed unfortunate that even after the judgment, the practice frowned upon by the Division Bench continues. We direct a copy of this judgment and order to be placed before the Prothonotary and Senior Master to take appropriate action in this regard and direct the Prothonotary and Senior Master to submit a compliance report within four weeks from today to Court.

124. The issuance of an order of injunction despite the undertaking as per Rule 148 not being furnished, would not render the injunction inoperative. Indeed, if that were so, almost every order of

injunction issued by this Court would be rendered ineffective.

125. The Division Bench itself did not consider the injunction as inoperative or ineffective on this ground. Had it been so, the Appeal would have been dismissed on that ground alone. The Division Bench, in fact, giving the Appellant the benefit of doubt, observed that the Appellant may have been misled by the prevailing erroneous practice. Had the Division Bench been of the view that interim orders are inoperative in the absence of such an undertaking, there would have been no question of giving the benefit of doubt to the Appellant.

126. An order of injunction becomes operative the moment it is passed/pronounded. Thus the moment an interim order is passed, parties are bound to observe and obey the same. Thus, even before the issuance of an interim order by the office, a party, if aware of the order, is bound to obey the same. This is settled law.

127. There is bound to be a hiatus between the pronouncement of the order by the Court and the issuance thereof by the office. The matter does not

end by the Plaintiff furnishing the undertaking. The office is bound to examine the undertaking to see if it complies with the provisions of Rule 148. All this takes time. It surely cannot be suggested that in the meantime parties are at liberty to violate the order. There is nothing in Rule 148 or in the judgment that supports this submission. To hold otherwise would lead to an absurdity and, in many, if not most cases, render the interim orders of this Court ineffective ab-initio. Let us illustrate this point.

128. Take for instance a case where a Court passes in the presence of parties an interim order restraining the Respondent from invoking a bank guarantee and the bank from making payment thereunder. If Mr.Chagla's submission is accepted, the Respondents could render the order ineffective by the bank forthwith making payment under the guarantee i.e. before the undertaking under Rule 148 is furnished.

129. However, a party who obtains an interim order, must be held to be bound by an undertaking as required by Rule 148 irrespective of whether or not such an undertaking is given. Where a party obtains

an interim order, it will be presumed, unless the Court otherwise directs, that he is bound by an undertaking to pay such sum by way of damages as the Court may award as compensation in the event of a party affected, sustaining prejudice by such order. A party obtaining advantage of an interim order cannot be heard to contend otherwise.

130. Orders of courts operate the moment they are pronounced and it is settled law that parties are bound by the orders even if they have notice thereof. It is axiomatic therefore that a party who obtains an injunction, takes, and must be deemed to have taken benefit thereof immediately upon the order being passed/pronounced. It would be unfair to permit the party at whose instance the order is passed to turn around at his pleasure and say that he did not intend the parties against whom the order is passed to be bound by the order. It is not in any event for the party to say so. The question of obedience to the orders of the Court transcends the personal benefit in favour of parties at whose instance the order is passed. Obedience to the orders of the Court is a matter of public policy and not just a question of the individual litigant’s protection.

131. Indeed, Mr.Chinoy did not dispute this position and conceded that the Appellant must be considered to be bound by an undertaking contemplated under Rule 148 despite the fact that the undertaking was not furnished by him.

vi) **Respondent Nos.8 and 9 cannot be held to have committed contempt of the orders as they had not attended the meetings at which the impugned resolutions were passed :**

132. Mr.D.J. Khambata and Mr.M.S. Doctor, appearing on behalf of Respondent Nos.8 & 9 respectively, while adopting Mr.Chagla's submissions also submitted that though the resolutions may be in breach of the order dated 25.10.2005, Respondent Nos.8 & 9 were not responsible for the same as they were not parties to the resolutions. The mere fact they were beneficiaries of the resolutions passed in contempt of the order of the Court would make no difference. In other words, according to them the mere fact that Respondent Nos.8 & 9 took benefit of the contumacious acts would not render them liable for contempt or to have their defence struck out. They submitted that Respondent Nos.8 & 9 had not

even attended the meeting at which the impugned resolutions were passed leave alone vote on the said resolutions. They submitted that in fact had they attended the meeting and voted on the resolutions, they would have been guilty of contempt by exercising the rights in respect of their shares which they were restrained from doing by virtue of the order dated 25.10.2005.

133. The submission is untenable. Admittedly Respondent Nos.8 & 9 were aware of the order dated 25.10.2005 and were equally bound by it. Admittedly they were aware of and had agreed from inception to the entire arrangement/scheme leading to the impugned resolutions. It is pertinent to note the following averments in the affidavit of Respondent No.8 dated 05.04.2006:-

> "5. ..... In the circumstances, we agreed that it would be best if Defendant/Respondent Nos.1 and 2 invest in the Hotel Project and take on the burden of the pending litigation. We approached Defendant/Respondent No.1 with our proposal. As there was no restraint on Defendant No.5 from issuing further or new equity, it was proposed that further equity in Defendant No.5 company would be issued in favour of Defendant/Respondent No.1 against his investment.
>
> 6. After negotiations with Defendant/Respondent No.1 and 2, the above proposal was agreed upon."

134. Added to this is the fact that admittedly in his negotiations with Respondent Nos.1, 2 & 3 Respondent No.6 represented all the shareholders of Respondent No.5. This is so stated in the affidavit-in-reply of Respondent No.1 dated 05.04.2006 in the Appeal. It is not controverted by any of the Respondents.

135. Obviously the further equity could only have been issued by increasing the authorised capital for the existing authorised capital was insufficient to raise an additional Rs.80 crores. This, in turn, required the passing of a resolution. The passing of the resolution required the exercise of rights in respect of the existing shares by the shareholders. Respondent Nos.8 & 9, therefore, knew that what they had agreed to was contrary to the orders of this Court.

136. Faced with this it was submitted that Respondent Nos.8 and 9 presumed that the resolutions would have been passed only in accordance with law. In other words, they presumed that Respondent Nos.1 to 7 would take all steps required in law to raise

the authorised capital including seeking leave of the court to do so in view of the order dated 25.10.2005.

137. This submission too is without any force. This aspect was not even pleaded in the affidavits filed by Respondent Nos.8 & 9. It is nothing but an after thought. That it is an after thought and was never the case of Respondent Nos.8 and 9 is established also by paragraphs 4 and 9 of their identical affidavits-in-reply, both dated 05.04.2006 filed in the Notice of Motion. The entire case of Respondent Nos.8 & 9 on affidavit was identical to the case of the other Respondents viz. that they did not consider the above resolutions to be contrary to the said order.

138. Neither Mr.Khambata nor Mr.Doctor went to the extent of contending that the resolutions themselves were not contrary to and in violation of the order dated 25.10.2005. In the circumstances, Respondent Nos.8 and 9 not merely consented to but effectively participated in and agreed to the entire scheme / arrangement. Respondent Nos.8 and 9 are parties to the proceedings and were equally bound by the said orders. They are therefore directly guilty of

contempt.

139. In any event they undoubtedly aided and abetted the breach of the order dated 25.10.2005. They received the benefits of the resolutions passed in contempt of the orders of this Court. They too refuse to part with the same. In other words they too refuse to purge the contempt. One who aids and abets the breach of a court order obstructs the course of justice and is guilty of contempt.

140. Halsbury's Laws of England Fourth Edition Vol.9 paragraph 85 at page 51 reads as under :-

> "**85. Aiding and abetting breach of order.** A stranger to an action who aids and abets the breach of a court order obstructs the course of justice, and is guilty of contempt punishable by committal. The punishment is inflicted, not for a technical infringement of the order, but for aiding and abetting others in setting the court at defiance."

141. There is a reference in Halsbury's Laws of England to the Judgement of the Court of Appeal in Seaward V/s. Paterson (1897) 1 Ch. 545. Proceedings were taken to commit one Murray who was not a party to the action either first or last.

That Murray knew of the injunction was admitted. The Court of Appeal unanimously held that though he may not have been bound by the injunction, he was bound like other members or the public, not to interfere with, and not to obstruct the course of justice. The case against Murray was held to be one of aiding and abetting others in setting up the court's defiance and deliberately treating the orders of the court as unworthy of notice. In such cases the court would not allow its process to be set at naught and treated with contempt. Thus although Murray was not a defendant in the action and was not a person against whom the injunction had been granted he was committed for contempt as despite the fact that he knew about the injunction he aided and abetted in committing a breach of it.

142. In *S.N.Bannerjee & Anr. V/s. Kuchwar & Co. AIR 938 PC 295*, the Privy Council noted the above judgment and endorsed the principle that persons could be held liable for contempt if they aid or abet the breach of an order.

143. In *Babulal V/s. Municipal Corporation, Ratlam (2005) 13 SCC 101*, the Supreme Court remanded a matter where the High Court proceeded on the basis

that a person not a party to the original proceedings cannot be proceeded against for contempt. The Supreme Court observed that the issue is a debatable one having regard to the law on the issue particularly in S.N. Bannerjee V/s. Kuchwar & Co. (supra).

144. We are in respectful agreement with the judgement of the Court of Appeal. We are bound by the judgment of the Privy Council. In the present case in fact Respondent Nos.8 & 9 are parties to the action and bound by the injunction. The case against them is stronger. There can therefore be no hesitation in holding them guilty of contempt.

145. We are of the view that a person who aids or abets the breach of a court order is also guilty of contempt punishable by committal. In the Notice of Motion however no prayer has been sought for the detention of Respondent Nos.8 & 9 or any of their officers in civil prison. There is nothing however that restrains the court from passing any of the other orders which have been sought in the Notice of Motion even though the same may affect Respondent Nos.8 & 9.

146. To hold otherwise would lead to the orders such as the order dated 25.10.2005 being rendered redundant. The entire effect of such orders could be circumvented by only some of the shareholders attending the meeting, passing a resolution in violation of the injunction and granting the benefit thereof to others. This would permit the beneficiaries of the resolution to contend that no action should be taken against them for they did not participate in the illegality. If we accept such arguments, it would render all such orders nugatory, redundant and ineffective.

147. In the circumstances, we hold that the said resolutions dated 27.03.2006 and 31.03.2006 are contrary to and in breach of the order dated 25.10.2005. We also hold that the disobedience by each of the Respondents of the order dated 25.10.2005 was wilful and deliberate. The contempt was aggravated first by fact that though an apology is mentioned in each of the Respondent’s affidavits, the same does not appear to be a genuine expression of regret, as there was not only no offer to purge the contempt but a resistance to do so. The contempt was further aggravated by the Respondents having done what they did only shortly before the

appeal reached hearing. They clearly did so in an attempt to present the court with a fait accompli. The contempt was also aggravated by the nature of the conduct of the Respondents, especially by Respondent Nos.1, 2 & 3 before us.

148. This brings us to the prayers in the Notice of Motion.

149. In prayer (a), the appellant seeks an order striking out the defences of the Respondents under Order 39, Rule 11 of the CPC (Maharashtra amendment), which reads as under:-

> "BOMBAY, DADRA AND NAGAR HAVELI-GOA, DAMAN AND DIU.-In Order XXXIX, after the existing Rule 10, add the following rule with marginal note as new Rule 11 and its marginal note:-
>
> "11. Procedure on parties, defying orders of Court and committing breach of undertaking to the Court.-Where the Court orders any party to a suit or proceeding to do or not to do a thing during the pendency of the suit or proceeding, or where any party to a suit or proceeding gives any undertaking to the Court to do or to refrain from doing a thing during the pendency of the suit or proceeding, and such party commits any default in respect of or contravenes such order or commits a breach of such undertaking, the Court may dismiss the suit or proceeding, if the default or contravention or breach is committed by the plaintiff or the applicant, or strike out the defences, if the default or contravention or breach is committed by the defendant or the opponent.

> (2) The Court may, on sufficient cause being shown and on such terms and conditions as it may deem fit to impose, restore the suit or proceeding or may hear the party in defence, as the case may be, if the party that has been responsible for the default or contravention or breach as aforesaid makes amends for the default or contravention or breach to the satisfaction of the Court: Provided that before passing any order under this sub-rule notice shall be given to the parties likely to be affected by the order to be passed." (1-10-1983) and (1-4-1987)"

150. Mr.Chinoy submitted that the provisions of Order 39, Rule 11 are mandatory. The question is however no longer res-integra. It is concluded by the Division Bench Judgement of this Court in Ramavatar V/s. Mulchand (2004) Mah. L.J.1 where it is held that the provisions are directory and not mandatory. The Division Bench inter-alia held as follows :-

> "Under Order 39, Rule 11(1) of the Code of Civil Procedure the consequence of dismissal of suit or striking out the defence follows where there is default in compliance of order of the Court or breach of an undertaking by the plaintiff or the defendant, as the case may be. The provision of Order 11, Rule 21 having been held to be directory in *M/s. Babbar Sewing Machine Co.* by the three Judge Bench of the Supreme Court, we have no hesitation in holding that for the selfsame reasons sub-rule (1) of Rule 11 of Order 39 of Code of Civil Procedure as introduced in Maharashtra by Bombay Amendment has to be held directory and the discretion exercisable by the Court in passing the order under sub-rule (1) of Rule 11 of Order 39 has to be in consonance and in conformity with the legal position laid down by the Supreme Court in

> *M/s. Babbar Sewing Machine Co.* In other words, the power of dismissal of suit or striking out the defence, as the case may be, under Order 39, Rule 11(1) of Code of Civil Procedure should be exercised for adequate reasons where the defaulting party fails ultimately in complying with the order of the Court of the undertaking; where the default is wilful and the conduct of the defaulting party contumacious and that results in causing substantial or serious prejudice to the opposite party."

151. The test laid down by the Division Bench clearly applies in the present case in view of the above findings. If in circumstances such as the present case the court does not invoke its powers under Order 39, Rule 11, it is difficult to see in which case it ought to do so.

152. We however refrain from exercising our powers by striking out the defences in view of Mr.Chagla's statement albeit towards the conclusion of the hearing, made before us on 04.08.2006.

Mr.Chagla stated that the Respondents would be willing to deposit the newly issued shares in court and that the allottees thereof would not claim any right, title or interest therein till the hearing of the suit. He stated that the Respondents are willing that the shares would abide by the final result of the suit. He stated that the cancellation

of the shares would not enure to anyone's benefit as the same would lead to HDFC recalling the loan. The entire project would be adversely affected thereby.

153. Mr.Chagla appears only for Respondent Nos.5, 6 & 7. The remaining Respondents stated that they have no objection to Mr.Chagla's suggestion.

154. Though we have not accepted this suggestion and do not consider it as purging the contempt, we will, despite our reservations, assume that the Respondents perceive it genuinely to be an expression of regret and a valid mode of purging the contempt. In the circumstances, only in view of this statement, we refrain from striking out the defences of the Respondents.

155. By prayer (b), the appellant seeks an order attaching the property of the Respondents under Order 39, Rule 2A of the CPC. It is not necessary to grant this relief as we intend setting aside and annulling the resolutions.

156. In prayer (c), the appellant has sought the detention of Respondent Nos.1 to 3, 6 & 7 in civil prison for a term not exceeding three months under

Order 39, Rule 2A of the CPC.

157. Counsel request us to permit them to peruse the judgment to enable them to address us on the issue of punishment. Accordingly on the issue of punishment the matter is adjourned to 24.11.2006 at 3.00 p.m.

158. In prayer (d), the appellant has sought an order setting aside and/or declaring as null and void the resolutions dated 27.03.2006 and 31.03.2006.

159. The Respondents did not question the jurisdiction of the court to set at naught transactions entered into in contempt of an order of the court. They merely contended that the facts and circumstances of the case did not warrant setting at naught the resolutions and the allotment of shares pursuant thereto. It is not necessary therefore for us to consider in any detail the judgements cited by Mr.Chinoy in this regard. Indeed there can be no doubt whatever regarding the court’s power to do so in a proper case. To hold otherwise would set at naught the orders of the Court. [See Century Flour Mills V/s. S. Suppiah, AIR 1975 Madras 270 (Full

Bench), Sujit Pal V/s. Prabir Kumar Sun, AIR 1986 Calcutta 220 (DB)]. The judgements were affirmed by the Supreme Court in *Union of India V/s. Kirloskar Pneumatics Co. Ltd., 1996 4 SCC 453.*

160. Mr.Chinoy submitted that the resolutions having been passed in breach of the order of injunction dated 25.10.2005 are void and not merely voidable. The Court in such circumstances is bound to annul the transaction. He cited several judgements in support of the submission. It is a submission with far reaching consequences especially for bona-fide third parties without notice. It is not necessary for us to consider this extreme proposition as we intend setting aside the resolution and annulling all acts consequent thereto anyway.

161. Mr.Chagla and Mr.Seervai submitted that even assuming that the resolutions were passed in contempt of the order of this court, we ought to see the justice of the case. According to them even assuming that the Respondents were guilty of contempt of court the justice of the case required that the resolutions ought not to be set aside.

162. At the outset we find it difficult in the facts and circumstances of this case to comprehend how the Respondents can even talk about the justice of the case considering their conduct through out including during the hearing before us.

163. The first factor according to Mr.Chagla was that HDFC will recall the loan and refuse to fund the project if the Respondents did not increase their equity participation.

164. HDFC has not stated that it refused or would refuse to fund the project unless the Respondents bring in further funds only by way of equity. As a matter of fact in this case HDFC has filed affidavits on other issues. There is however no affidavit from HDFC to the effect that it agreed to fund the project only if there was an increase in the equity of Respondent No.5. In other words HDFC has not stated that it would not have agreed to fund the project even if the existing shareholders had brought in the money otherwise, such as by way of loans from the promoters, existing shareholders or from others. Respondent No.5 was free to raise funds in any manner other than by committing a breach of the order dated 25.10.2005.

165. When we put this to Mr.Chagla, he responded by saying that Respondent Nos.1, 2, 3, 8 & 9 were in a worse position by subscribing to the new shares to such a large extent. He stated that having brought in the money by subscribing to the shares, Respondent Nos.1, 2, 3, 8 & 9 cannot now demand the return of the money whereas had they brought the money in by way of debt / loans to Respondent No.5, they could demand the return of the same.

166. The explanation is not convincing. HDFC has nowhere stated that if the money which was paid for the shares had been lent to Respondent No.5, it would not have funded the project under any circumstances. Anybody familiar with banking transactions knows that financial institutions often agree to fund a venture / company upon the promoters bringing in a proportionate amount either by way of equity or by way of debt and if it is by debt, it is with the condition that the promoters will not recall their loans until the dues of the financial institutions are satisfied.

167. Nothing prevented the Respondents from doing the same in the present case. There was no answer

to this from any of the counsel.

168. Significantly none of the Respondents suggested that Respondent No.5 may retain the amounts paid towards the allotment of shares as a loan and that the allotment of shares be cancelled. This would have established their bona-fides. We put this to the Respondent’s counsel. They did not agree.

169. They then submitted that Respondent Nos.1 to 3, 8 & 9 had invested a large amount pursuant to the said resolutions. It is submitted that if the resolutions were set aside, these Respondents would suffer an enormous financial loss. They further submitted that the entire hotel project would also be affected.

170. We are unable to agree. The loss, if any, has been caused by their own action. They have only themselves to blame. In effect the submission amounts to inviting us to accept that the commercial interests of the Respondents ought to be placed higher than the principle of obedience to the orders of this court. That cannot be. It is always open to the Respondents to take steps in accordance with

law to ensure that the project does not suffer. They may do so even now. If they do so, obviously the application will be dealt with in accordance with its own merits. But to permit them to take advantage of their own wrong would send out a wrong signal and adversely affect the rule of law.

171. In the case of *Century Flour Mills V/s. S. Suppiah AIR 1975 Madras 270,* a Full Bench of the Madras High Court observed as under :-

> "8. .....
> "So far as F.A.F.O. No.251 of 1973 and C.R. 875 of 1972 are concerned, it may be pointed out that the mere fact that the applicants had been dispossessed after the interim injunction order had been issued would not be enough to treat the chapter in regard to possession over the house as closed. If a person had been dispossessed by wilfully disobeying an order of injunction the court which issued the order of injunction can after considering the circumstances of each case and the conduct of the parties always pass such an order in the ends of justice as would undo the wrong done to the party in whose favour the order of injunction had been issued. The exercise of this inherent power vested in the court is based on the principle that no party can be allowed to take advantage of his own wrong in spite of the order to the contrary passed by the court; see State of Bihar v. Ushadevi,

> AIR 1956 Pat 455 and Magna v. Rustam, AIR 1963 Raj.3"
>
> 9. In our opinion, the inherent powers of this court under Section 151 CPC are wide and are not subject to any limitation. Where in violation of a stay order or injunction against a party, something has been done in disobedience, it will be the duty of the court as a policy to set the wrong right and not allow the perpetuation of the wrong doing. In our view, the inherent power will not only be available in such a case, but it is bound to be exercised in that manner in the interests of justice. Even apart from Section 151, we should observe that as a matter of judicial policy, the court should guard against itself being stultified in circumstances like this by holding that it is powerless to undo a wrong done in disobedience of the court's orders. But in this case it is not necessary to go to that extent as we hold that the power is available under Section 151, C.P.C." (emphasis supplied)

172. The judgement and in particular the words emphasised was affirmed by the Supreme Court in *DDA V/s. Skipper Construction Co. (P) Ltd. (1996) 4 SCC 622.* In paragraphs 17 to 21, it is held:-

> "*The contemner should not be allowed to enjoy or retain the fruits of his contempt.*
>
> 17. The principle that a

contemner ought not to be permitted to enjoy and/or keep the fruits of his contempt is well settled. In Mohd. Idris v. Rustam Jehangir Babuji this Court held clearly that undergoing the punishment for contempt does not mean that the court is not entitled to give appropriate directions for remedying and rectifying the things done in violation of its orders. The petitioners therein had given an undertaking to the Bombay High Court. They acted in breach of it. A learned Single Judge held them guilty of contempt and imposed a sentence of one month's imprisonment. In addition thereto, the learned Single Judge made appropriate directions to remedy the breach of undertaking. It was contended before this Court that the learned Judge was not justified in giving the aforesaid directions in addition to punishing the petitioners for contempt of court. The argument was rejected holding that "the Single Judge was quite right in giving appropriate directions to close the breach (of undertaking)."

18. The above principle has been applied even in the case of violation of orders of injunction issued by civil courts. In Clarke v. Chadburm Sir Robert Megarry V-C observed:

"I need not cite authority for the proposition that it is of high importance that orders of the court should be obeyed. Wilful disobedience to an order of the court is punishable as a contempt of court, and I feel no doubt that such disobedience may properly be described as being illegal. If by such disobedience the persons

enjoined claim that they have validly effected some charge in the rights and liabilities of others, I cannot see why it should be said that although they are liable to penalties for contempt of court for doing what they did, nevertheless those acts were validly done. Of course, if an act is done, it is not undone merely by pointing out that it was done in breach of the law. If a meeting is held in breach of an injunction, it cannot be said that the meeting has not been held. But the legal consequences of what has been done in breach of the law may plainly be very much affected by the illegality. It seems to me on principle that those who defy a prohibition ought not to be able to claim that the fruits of their defiance are good, and not tainted by the illegality that produced them."

19. To the same effect are the decisions of the Madras and Calcutta High Courts in Century Flour Mills Ltd. v. S. Suppiah and Sujit Pal v. Prabir Kumar Sun. In Century Flour Mills Ltd. it was held by a Full Bench of the Madras High Court that where an act is done in violation of an order of stay or injunction, it is the duty of the court, as a policy, to set the wrong right and not allow the perpetuation of the wrongdoing. The inherent power of the court, it was held, is not only available in such a case but it is bound to exercise it to undo the wrong in the interest of justice. That was a case where a meeting was held contrary to an order of injunction. The Court refused to recognise that the holding of the meeting is a legal one. It put back the parties in the same position as they stood

> immediately prior to the service of the interim order.
>
> 20. In Sujit Pal a Division Bench of the Calcutta High Court has taken the same view. There, the defendant forcibly dispossessed the plaintiff in violation of the order of injunction and took possession of the property. The Court directed the restoration of possession to the plaintiff with the aid of police. The Court observed that no technicality can prevent the court from doing justice in exercise of its inherent powers. It held that the object of Rule 2-A of Order 39 will be fulfilled only where such mandatory direction is given for restoration of possession to the aggrieved party. This was necessary, it observed, to prevent the abuse of process of law.
>
> 21. There is no doubt that this salutary rule has to be applied and given effect to by this Court, if necessary, by overruling any procedural or other technical objections. Article 129 is a constitutional power and when exercised in tandem with Article 142, all such objections should give way. The court must ensure full justice between the parties before it."

173. One of the judgments relied upon by Mr.Chinoy in support of his contention that transactions entered into in breach of a prohibitory order are void is in the case of *Keshrimal Jivji vs. Bank of Maharashtra (2004) 7 LJ Soft 16.* Though we have refrained from expressing our view on this

proposition the judgment, in the facts of this case especially where the rights of third parties are not involved certainly supports the Appellants' case for an order annulling the transactions. Indeed if in these facts we were not to annul the resolutions we would be acting contrary to the Division Bench judgment. After referring to various judgments of the Supreme Court the Division Bench held :-

> 26. We cannot accept Shri Naphade's contention that observations of the Supreme Court in the case of Surjeet Singh should be read as restricted to proceedings under Order 22 Rule 10 of C.P.C. and the same cannot be extended to defiance of injunction order issued under Order 39 Rule 1 of C.P.C. Once the issue is placed on the pedestal of public policy and the very faith of litigants in Rule of law and administration of justice, then it is not possible to make the distinction or bifurcation suggested by Shri Naphade. It would mean that consequences of nullifying such transaction not being provided by the Statute, it would not lose its legal efficacy even if it is in utter disregard to or in violation of or breach of prohibitory order or order of injunction issued by a Court of law. It would mean that parties can breach and violate Court orders openly and with impunity and neither they nor the beneficiaries suffer any consequences. It is time that we recognise the principle that transfer of immovable property in violation of an order of injunction or prohibition issued by Court of law, confers no right, title or

> interest in the transferee, as it is no transfer at all. The transferee cannot be allowed to reap advantage or benefit from such transfer merely because he is not party to the proceedings in which order of injunction or other prohibitory direction or restraint came to be issued. It is enough that the transferor is a party and the order was in force. These two conditions being satisfied, the transfer must not be upheld. If this course is not adopted then the tendency to flout orders of Courts which is increasing day by day can never be curbed. The Court exercises its powers on the foundation of respect and regard for its authority by litigating public. People would lose faith and respect completely if the court does not curb and prevent this tendency. The note of caution of the Supreme Court must be consistently at the back of everybody's mind. Therefore, Shri Naphade is not right in the distinction which he is trying to make.

174. The effect of the judgment is clear. The effect of the judgment on the facts of this case is clearer. Realizing this it was submitted that the judgment applies only to cases involving immovable property. We are unable to agree. There is nothing in the judgment which justifies the contention. There is nothing in principle or in law which even remotely suggests the same. The Division Bench was dealing with the law of injunction and the law of contempt, not the law of contempt involving only

immovable property. The ratio is general in its application and not limited to cases involving immovable properties alone.

175. In the circumstances, we are of the view that the impugned resolutions ought to be set aside. It would however be necessary to ensure that the share subscription money is not utilized without orders of this court in appropriate proceedings. This is to protect the rights and interests of all the parties in respect thereof including the allottees of the new shares.

176. The Respondents agreed that evidence be recorded by a Commissioner for taking evidence. They shall make an application in that behalf to the learned Judge hearing suits.

177. In the circumstances, we pass the following order :-

(a). We hold that each of the Respondents has willfully disobeyed and has thereby committed contempt of the order of this Court dated 25.10.2005. On the issue of punishment the matter is adjourned to 24.11.2006 at 3.00 p.m.

(b). The Notice of Motion is made absolute in terms of prayer (d).

(c).(i) Respondent No.5 is restrained from dealing with or utilizing the amounts received by it towards allotment of the new shares in any manner whatsoever including paying the same to any party or parties.

(ii). Respondent No.5 shall within a period of eight weeks from today deposit all the amounts received by it towards allotment of the new shares pursuant to the said resolutions in court. Thereupon the Prothonotary & Senior Master, High Court, Bombay, shall invest the same in fixed deposits of a Nationalized Bank initially for a period of one year and thereafter for like periods of one year each.

(iii). The parties are at liberty to make an application or adopt any other proceedings in respect of the said amounts.

(d). Each of the Respondents shall pay the

costs of this Notice of Motion fixed at Rs.10,000/- to the Appellants within a period of eight weeks from today.

178. The order is stayed for eight weeks from today to enable the parties to challenge the same.

(S.J.VAZIFDAR, J.) (DR.S.RADHAKRISHNAN, J.)